No. 83-1174

In The

Supreme Court of the United States

October Term, 1983

DIAMOND SHAMROCK CHEMICALS COMPANY, *et al.*,

Petitioners,

vs.

MICHAEL F. RYAN, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondents respectfully submit this brief in opposition to the petition of Diamond Shamrock Chemicals Company, *et al.*, for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 9, 1984 in *In re Diamond Shamrock Chemicals Company, et al.*, No. 83-3065.

OPINION BELOW

Subsequent to the filing of the petition herein, the Court of Appeals issued its opinion, which appears herein at page 1a.

STATEMENT OF THE CASE

The petition correctly states that the action underlying these proceedings arises out of the sale by the petitioner of Agent Orange and related herbicides for use by the military in Southeast Asia during the Vietnam conflict. Respondents are United States, Australian and New Zealand military personnel, their wives, children and, in some cases, their next of kin, who suffered personal injury as a result of exposure to the herbicides and their contaminant 2, 3, 7, 8 trichloro-dibenzo-p-dioxin ("dioxin"). Numerous actions were filed in various federal courts which were transferred to the Eastern District of New York pursuant to 28 U.S.C. §1407.

The case involves issues of strict products liability, improper manufacture, failure to warn, negligence and conspiracy to conceal, on the one hand, and defenses of misuse and a "government contract" defense[1] on the other.

Respondents early moved to have the action certified as a class action under Fed. R. Civ. Pro. Rule 23. In response to that motion, then District Court Judge George C. Pratt[2] made a preliminary determination that the action was indeed suitable for class certification and he did make "provisional" certification pursuant

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1. *See* 534 F. Supp. 1046 (E.D.N.Y. 1982)

2. Judge Pratt was subsequently appointed United States Circuit Judge for the Second Circuit on June 29, 1982. He retained jurisdiction over the *Agent Orange* cases until his duties with the Court of Appeals compelled him to resign in favor of Judge Weinstein.

to Rule 23(b)(3). *In re Agent Orange Product Liability Litigation*, 534 F. Supp. 1046 (E.D.N.Y. 1982). In mid-October of 1983, Chief Judge Jack B. Weinstein assumed control of the case from Judge Pratt. Following upon Judge Pratt's work, Judge Weinstein, through the Special Master, Sol Schreiber, conducted extensive hearings into the class certification matter. After further briefing by all parties, Judge Weinstein advised the parties in open court on December 16, 1983 of his decision to certify a class pursuant to Rule 23(b)(3) with respect to respondents' damage claims, and pursuant to Rule 23(b)(1) as to claims for punitive damages. Judge Weinstein also set out notice requirements tailored to meet the practical problems of the case. These determinations were incorporated into a written decision and order issued on December 16, 1983.

At the time Judge Weinstein announced his decision from the bench, petitioners requested the court to certify the issue to the Court of Appeals for the Second Circuit for an interlocutory appeal pursuant to 28 U.S.C. §1292(b). This was denied from the bench, but the court's written opinion and order gave petitioners a stay of 7 days to seek further relief from the Court of Appeals (33A).[3] Thereafter, petitioners commenced this proceeding for an extraordinary writ to prevent Judge Weinstein from executing his order. 28 U.S.C. §1651, Fed. R. App. Proc. Rule 21.

The Court of Appeals denied the writ. In language that went far beyond what was necessary to decide the denial of mandamus, the Court of Appeals indicated that not only was there not palpable error but rather there were "substantial grounds" to support the District Court's decision on the certification of the class.

The Court of Appeals made the following specific findings:

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3. References ("__A") are to pages in petitioner's appendix; references ("__a") are to pages in appendix, *infra*.

1. The Agent Orange case was "*sui generis*" involving ". . .an extraordinary constellation of facts, parties and pleadings. Accordingly, it is not a case where mandamus is likely to encourage the use of similar procedures by . . . district courts in the future . . . ."

2. There were "substantial grounds" to support the District Court's conclusion "that common issues predominate and that a class action is the most efficient means of adjudicating them." The common factual issues noted include:

> "what each manufacturer knew and when it knew it, what each told the government and when it did so, what the government learned on its own and when it did so, what hazards of Agent Orange were known then and are known now, what influence the government exercised over the composition of the herbicide, and what various manufacturers communicated to each other." (5a).

Thus, fact finding would resolve once and for all the questions regarding "alleged failure to warn, the defense of misuse, and the so-called government contract defense", and in addition it would dispose of respondents' claim that petitioners conspired to conceal the dangers of Agent Orange from the Government.

3. The court rejected, as grounds for mandamus, petitioner' challenge to the class notice ordered by the District Court which includes

> "[W]ritten notice to all plaintiffs and intervenors in actions brought in federal courts and to all persons currently listed on the Veterans Administrations' 'Agent Orange Registry'. Provision is also made for requests to radio and

> television networks and stations to broadcast notice, as well as notice by advertising in a number of newspapers and magazines. Notice is also to be given to the governors of each state who will be requested to notify any state organizations dealing with the problems of Vietnam veterans and then to notify Vietnam veterans identified by such organizations who may be a member of the class."

The Second Circuit noted that Chief Judge Weinstein found this to be the best notice practicable under the circumstances, and held that his conclusion, "if not inexorable, is arguably correct." (8a).

Thus, not only did the Second Circuit not find "a calculated and repeated disregard of governing rules" by the District Court's exercise of its discretion to justify issuance of the writ of mandamus (3a), but rather, after carefully reviewing the appropriateness of class certification, and the class notice procedures which Judge Weinstein prescribed and the case law on which he relied, agreed with the District Court that its order certifying the class and providing for notice were proper at this juncture of the proceedings.

ARGUMENT

Petitioners make little pretense that the review they seek is not from the decision of the Court of Appeals that denied them an extraordinary writ, but from the order of the District Court certifying the class, with which they disagree. Thus, with regard to the considerations listed under Rule 17 of the Rules of this Court, they do not claim that there is a conflict among circuits concerning interlocutory appeals to review class action determinations, nor do they claim that the Court of Appeals misapplied important or controlling precedent on the subject of

extraordinary writs; instead, the petition is directed almost exclusively at the decision and order of the District Court and the manner in which, as petitioners see it, the District Court brought itself into conflict with other precedents. In short, what petitioners seek is an interlocutory appeal from the class action determination.

Notwithstanding that this is but a thinly-disguised application for interlocutory review, petitioners make little attempt to show how the present issues in their current interlocutory procedural posture are of "imperative public importance." (Rule 18 of the Rules of this Court). It is doubtless of importance to petitioners, but the identity of their interests with the interests of the public is not easily perceived. That the public at large will (intentionally) see the published and broadcast notices, may be curious about it and may even discuss it does not bring the case within the realm of the *res publica*. Similarly, while there may be a natural desire on the part of petitioners to have the matter of class certification settled before the case goes to trial, it is difficult to see how that desire can or should be characterized as "imperative." Petitioners, in this regard, would seem to be in no different position from many other litigants who believe they could expedite a case if only they could obtain an appellate imprimatur on some intermediate procedural point. Such efforts normally fail, and they should fail here.

The fact is that this is a products liability case. It is unique because of its size and because of some of the factual events out of which it arises. But the uniqueness, size and complexity of this case, are the very reasons why the discretion of the District Court in managing the litigation should be upheld as it was by the Second Circuit and not become the basis for the issuance of a writ of certiorari. So far as the class certification matter is concerned, however, that is a procedural matter which at this intermediate stage of the litigation is not of such "imperative public

importance" as to warrant immediate review by certiorari, thereby bypassing the normal appellate process which will be available at the conclusion of this litigation.

The Court should not be oblivious, either, to the tactical considerations underlying this writ. As noted in the petition, the case is scheduled for trial on May 7, 1984. If petitioners succeed in obtaining review they will, even if they ultimately do not prevail before this Court, gain substantial advantage in delaying their accountability even a few months longer. Of course, if petitioners prevail in this Court they will accomplish an even greater objective that they have pursued since the outset of this case: they will have atomized the litigation and rendered it virtually nonjusticiable.

The fact of the matter is that the Court of Appeals acted quite properly in rebuffing petitioners' interlocutory appeal.

I.

ASSUMING, ARGUENDO, THE POSSIBILITY (ONLY) OF ERROR IN THE DISTRICT COURT'S OPINION, THE EXTRAORDINARY WRIT OF MANDAMUS IS INAPPROPRIATE WHERE A DISTRICT JUDGE IS MANAGING A UNIQUE AND COMPLEX LITIGATION.

As petitioners themselves recognized in the court below, the issuance of a writ of mandamus is appropriate only in extraordinary circumstances. The writ is not intended to authorize appellate review of otherwise unappealable orders. *Ex parte Fahey*, 332 U.S. 258, 260 (1947). Its office is solely to control usurpations of power or utter neglect of duty. It is not used to superintend matters clearly within the trial court's jurisdiction.

The standards governing mandamus relief have long been clear. They were summarized in *In re United States of America*, 680 F.2d 9 (2d Cir. 1982):

"Initially, it is important to note that "mandamus cannot be utilized as a substitute for an appeal." *International Business Machines Corp. v. United States*, 480 F2d 293, 298 (2d Cir. 1973) (en banc) cert. denied, 416 U.S. 979 980, 94 SCt., 2413, 40 L.Ed. 2d 776 (1974); see *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34-36, 101 S.Ct. 188, 189-191, 66 L.Ed. 2d 193 (1980) (per curiam); *Schlagenhauf v. Holder*, 379 U.S. 104, 110, 84 S.Ct., 234, 238, 13 L.Ed. 2d 153 (1964). Mandamus is an extraordinary remedy, the 'touchstones' of which are 'usurpation of power, clear abuse of discretion and the presence of an issue of first impression', *American Express Warehousing, Ltd. v. Transamerica Insurance Co.*, 380 F.2d 277, 283 (2d Cir. 1967); it 'has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Will v. United States*, 389 U.S. 90, 95, 88, S.Ct. 269, 273, 19 L.Ed. 2d 305 (1967) (quoting *Roche v. Evaporated Milk Association*, 319 U.S. 21, 26, 63 S.Ct. 938, 941, 87 L.Ed. 1185 (1943). Writs of mandamus are generally granted only in cases presenting exceptional circumstances or of extraordinary significance, see, eg., *Schlagenhauf v. Holder, supra.*, 379 U.S. at 110-11, 85 S.Ct. at 238-239; *In re Attorney General, supra.*, 596 F.2d at 63-64; *Investment Properties International, Ltd. v. IOS, Ltd.*, 459 F.2d 705, 708 (2d Cir. 1972); *United States v. United States District Court*, 444 F.2d 651, 655-56 (6th Cir. 1971), aff'd. on other grounds, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed. 2d 752 (1972), and this Court has noted a special

> reluctance to grant such a remedy, *In re Attorney General, supra.*, 597 F.2d at 63. '(M)ere error even gross error in a particular case, as distinguished from a calculated and repeated disregard of governing rules, does not suffice to support issuance of the writ.' *United States v. DeStefano*, 464 F.2d 845, 850 (2d Cir. 1972)."

Class notice deficiencies are not the types of defects which warrant mandamus. *Pfizer v. Lord*, 449 F.2d 119 (2d Cir. 1971).

Notwithstanding the lip service that petitioners paid to these settled principles, they sought a writ of mandamus with respect to each part of P.T.O. #72[4] as if Judge Weinstein had not simply erred, but had usurped power and egregiously abused his discretion in each section of his opinion. In doing so, petitioners revealed that their tactic was to create the very state of affairs that sparing use of mandamus is intended to avoid, *i.e.*, to undermine the finality of a District Court's judgment and to circumvent the rules for interlocutory appeals.

Petitioners characterize this litigation as an "extraordinary proceeding" (Petition, p. 16). Respondents agree only that it is extraordinary in complexity, in the size of the class, the nature of the parties and in the amount of judicial time consumed. Respondents do, however, differ in what we see as the implications of the unique and extraordinary elements of this case.

Petitioners attempt to use this uniqueness as a touchstone for a mandamus petition. In actuality, however, just the opposite is true. As petitioners recognize, mandamus is appropriate where error is likely to recur because one court's actions are likely to

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4. Because of their large numbers, the pretrial orders in the District Court have come to be designated "P.T.O. #____."

be relied on by other courts. Thus, petitioners trot out the spectre that any error committed and not immediately corrected in this case will affect hundreds of product liability cases pending throughout the country. The Court of Appeals disposed of this argument, recognizing the very uniqueness of this case, however, ensures that no such result would obtain, even if there is a colorable claim of error (7a). Judge Weinstein, as Judge Pratt before him, was careful to fashion his opinion to the particular needs of this litigation. Less complex litigation would not require the managerial efforts that Judge Weinstein has properly invoked here. It is not credible to say that district judges in other cases would be incapable of recognizing distinctions between the complexity of this case and less cumbersome product liability cases.

Indeed, it is the extraordinarily complex nature of this litigation that mandates a trial judge's possession of sufficient latitude to structure the litigation in a manner that serves the interests of the parties and of expeditious judicial administration. Management of a complex class action requires numerous practical decisions concerning the structure of the lawsuit. Questions bearing on certification and on the merits are often inextricably intertwined. As layers of complexity are exfoliated during the litigation, a trial judge retains authority to modify earlier orders and to restructure the litigation. Indeed, P.T.O. #72 itself is a response to just such an unraveling of this litigation. As Judge Weinstein noted, his opinion was pursuant to Judge Pratt's earlier determination that development of the litigation "may require consideration" of the initial certification.

As other courts have recognized, the retention of latitute by the District Court in managing complex litigation facilitates the utility of the class action. "This flexibility enhances the usefulness of the class action device . . ." *General Telephone of Southwest v. Falcon,* 102 S. Ct. 2364, 2372 (1982). *See Burns v. United States R.R. Retirement Board,* 701 F.2d 189, 191-92 (D.C. Cir. 1982)

(original definition and certification of class may require subsequent alteration or amendment as case unfolds and thus should not be interfered with by Court of Appeals); *Pfizer v. Lord*, 449 F.2d 119 (2d Cir. 1971) (defects in class notice not subject to mandamus remedy).

In order to manage efficiently this exceedingly complex case, *both distinguished District Court judges assigned to this case have found the class action format to be appropriate.* This has been done not only within the letter, but also within the spirit of the federal rules which mandate the construction of specific provisions to secure "the just, speedy and inexpensive determination of every action." Fed. R. Civ. Proc. Rule 1. It has also occurred against a background in which both courts and commentators have begun to recognize that the federal rules concerning class actions cannot be said woodenly not to apply to mass tort cases that are otherwise amenable to the class action format. *See* Note, *Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 Harv. L. Rev. 1143 (1983); McGovern, *Management of Multiparty Toxic Tort Litigation Case Law and Trend Affecting Case Management*, 19 Forum 1 (1983).

The appropriateness of what has been done by two District Court judges in this case is perhaps best reflected by asking what else could have been done. As Judge Weinstein was quick to observe, the alternatives were grossly unsatisfactory, whether they consisted of the individual prosecution of tens of thousands of separate claims in the federal courts or the denial of any effective forum to individuals with claims of injury.

Given the need for judicial latitude to manage a case of such complexity, no case for mandamus exists. At most, petitioners established that different courts under different circumstances have decided the class certification issue differently. In this situation, the writ was properly refused, even if this Court were to believe

that Judge Weinstein erred. As this Court has more recently confirmed, mandamus is not to be used as a substitute for the normal appellate process. *Kerr v. United States District Court*, 326 U.S. 394, 402-03 (1976).

In *Green v. Wolf Corporation*, 406 F.2d 291, 298 (1968), the Second Circuit accepted as the guiding principle in determining whether class action was appropriate, the following language from *Esplin v. Hirski*, 402 F.2d 94 (9th Cir. 1968):

> "It cannot be denied that the resolution of the class action issue in suits of this type places an onerous burden on the trial court. But if there is to be *an error made let it be in favor and not against the maintenance of the class action*, for it is always subject to modification should later developments during the course of the trial so require." (Emphasis added.)

The policy favoring the maintenance of this class ction is yet another reason to deny and to defer to normal appellate review on the basis of a fully developed record, any alleged error.

It is also worth noting that among the circumstances a court should consider is whether the parties would be prejudiced if mandamus were granted or withheld.

The first Agent Orange cases were filed as a class action in the District Court in early 1979. More than 15,000 claims are now pending in the District Court. The Agent Orange victims not only comprise terribly damaged veterans, but also include the spouses, and infants born with genetic birth defects and malformities. The potential size of respondents' class in this litigation was estimated by the District Court to number in the tens of thousands, and by the Special Master, directed to conduct a limited Rule 23(b)(1)(B) evidentiary hearing, at 40,000 to 50,000.

Since the inception of the litigation members of the class have died, and are dying, without compensation for their injuries and suffering. The Government has refused to provide medical care, treatment and other benefits because it does not as yet recognize that respondents' injuries were service-connected.

The injury claims of this vast class of victims arise because of the wrongful conduct of the petitioner chemical companies in supplying dioxin-contaminated herbicides to the U.S. Government for use in the Vietnam War to which the respondent veterans were exposed. Dioxin has been acknowledged by many to be the deadliest toxic substance ever created by man.

The Agent Orange cases are scheduled for trial in May 1984. P.T.O. #72 is designed to provide class notice procedures which will enable the parties' claims and defenses to be resolved at such trial with finality and binding effect.

The issuance of a writ of mandamus on the eve of trial would have totally disrupted the careful and exhaustive case management pursued with herculean effort by Judges Pratt and Weinstein and Special Master Schreiber. To what avail? Class certification does not prejudice petitioners. If petitioners lose on the common issues, each respondent must still prove proximate cause and individual damages in order to recover. If petitioners win on the common issues, *all respondents' claims are defeated.* If, as petitioners claim, the class notice directed by P.T.O. #72 is defective, and therefore not binding on absent class members, what prejudice have petitioners suffered? The need to relitigate the common issues with such absent respondents? Perhaps, but such relitigation of tens of thousands of claims in all the courts of the United States for a millenium, is precisely what petitioners are seeking in their last-ditch effort to secure mandamus and decertification. The hypocricy of petitioners' position deserves no further elucidation.

II.

THE DISTRICT COURT CORRECTLY DETERMINED THE CLASS CERTIFICATION ISSUES.

Although the issue to this Court is the correctness of the Second Circuit's refusal to issue an extraordinary writ to intervene in the interlocutory proceedings of the trial court and not the actions of the District Court itself, it is worthwhile to note that the actions of the District Court were perfectly proper in the premises.

The District Court carefully considered the various parameters set forth under Rule 23, and the Court of Appeals concurred in its approach, at least to the extent of the record developed. Among the principal findings were that common issues of law and fact predominated in the litigation; that the complainants' claims were typical of those of the class; that the punitive damages claims were most properly handled under Rule 23(b)(1)(B); and that the Notice requirements satisfied the requirements of the rule and of due process.

A. Commonality

The Court of Appeals concluded, "it is clear that common issues relating to the nature of the hazards caused by Agent Orange are directly involved in the parties' various contentions regarding an alleged failure to warn, the defense of misuse and the so-called government contract defense. Respondents' claim that the petitioners conspired to conceal the dangers of Agent Orange also raises a common issue of fact." (4a). In reality, the scope of common issues exceeds even this inventory. A slight consideration of the issues at trial indicates that the following would arise in almost every individual or group case:

1. The herbicides manufactured by the petitioners and sold to the government were toxic and dangerous to health and would cause the injuries complained of by the respondents.

2. Petitioners knew or should have known of such dangers.

3. Petitioners knew or should have known of the means of avoiding or reducing such hazards.

4. The petitioners failed to warn the government, the respondents or the public at large of such hazards and the means of risk reduction when the petitioners, collectively and individually, had the duty so to warn.

5. The petitioners acted in concert and as an enterprise to breach their duty to warn.

6. The petitioners were negligent in the design and manufacture of the herbicides.

7. The herbicides manufactured and sold by petitioners were defective and unreasonably dangerous.

8. The petitioners breached duties imposed on them by the contracts they made with the government.

9. The petitioners breached their implied warranty of merchantability.

10. The petitioners breached express warranties required under the government contracts.

11. The petitioners misrepresented to the government their knowledge of the hazards associated with the

herbicides and withheld such information from the government and the public.

As the Court of Appeals noted, many of the defenses — and particularly the government contract defense and the defense of misuse of the product by the military — would be common to most, if not all, of the cases.

Similarly, the Court of Appeals identified several common issues of fact to be resolved, including "what each manufacturer knew and when it knew it, what each told the government and when it did so, what the government learned on its own and when it did so, what hazards of Agent Orange were known then and are known now, what influence the government exercised over the composition of the herbicide, and what various manufacturers communicated to each other." The court noted that the resolution of some of these issues in a single trial in petitioners' favor could end the litigation entirely.

The petitioners concentrate on the issue of commonality to urge reversal of the trial court. Thus, they argue that it is impossible to try the liability case as one because liability depends on the law of the several states according to each respondent. Secondly, petitioners argue that the individual issues of dosage, injury and damage are the ones that predominate, not the common issues, citing *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*, 693 F.2d 847 (9th Cir. 1982), *cert. denied sub nom. A.H. Robins, Inc. v. Abed*, ____ U.S. ____ (1983).

So far as the "multiple law" question is concerned, the District Court, subsequent to the decision for which mandamus was sought herein, issued a further decision concerning choice of law questions. A copy of the opinion is annexed to this brief (9a). In that decision, Judge Weinstein noted that the supposed

conflicts of law among the several states are really minimal and that there is a general concensus in approach to legal issues. Furthermore, with respect to the common issues of conspiracy, and unforeseeable use, there are no choice of law problems because these questions are an integral part of the tort law of every jurisdiction. What minor variations exist in certain matters may be handled through appropriate subclasses. The Court of Appeals saw no palpable error in that approach (7a).

Concerning the question of whether the common issues dominated the litigation or were dominated by individual issues, two different District Court judges, Judge Pratt and Judge Weinstein, have found that the common issues predominated. The Court of Appeals, moreover, agreed that the common issues should be tried as the most efficient means of adjudicating them. The Court of Appeals specifically found that the nature of the common issues and of the litigation as a whole took it out of the usual bias against class action treatment for mass tort cases.

Relying on the findings of the Special Master after hearings, Judge Weinstein also found that the punitive damages claims could best be tried under Rule 23(b)(1)(B), otherwise there would be a race to the courthouse to get the first and largest awards. Again, the Court of Appeals specifically affirmed this treatment of the issues by the District Court.

B. Typicality

Even prior to Judge Weinstein's ruling, Judge Pratt had found:

> "Rule 23(2)(3) requires that in a class action 'the claims or defenses of the representative parties (be) typical of the claims or defenses of the class.' As already noted, *plaintiffs' claims of negligence,*

> *products liability and general causation, as well as the defendants' government contract defense are not just 'typical' of the entire class, they are identical.* In a few areas, such as the rules governing liability and the application of various statutes of limitations, the claims may fall into groups that are 'typical', but even there the different groups' claims can be efficiently managed either on a subclass basis or directly by way of separately determining the issues. Although the named plaintiffs for purposes of the class action are yet to be designated, *the court is satisfied that out of the extremely large pool available representative plaintiffs can be named who will present claims typical of those of the class.* As already indicated, the issues of specific causation and damages will, of course, ultimately require individual consideration, but until that point in the litigation is reached, a class action appears to be the only practicable means for managing the lawsuit." 506 F.Supp. at 787, 788. (Emphasis added.)

The requirement that the representative's claims be typical of those of the class does not require that they be identical. The rule requires only that the representatives have typical claims as to the common issues based on the same legal theories and that their injuries fall within the range of types of injuries capable of being caused by petitioners' tortious conduct.

Again, the District Court has the power to fashion subclasses, or to make other orders, necessary or appropriate to ensure proper representation. *Green v. Wolf Corporation,* 406 F.2d 291 (2d Cir. 1968). With a pool of claimants to work with, the thought that no typical claimants can be found is, on its face, ludicrous.

C. Notice Requirements

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974) requires that individual notice be given to class members. As is noted in *In re Nissan Motor Corp. Antitrust Litigation,* 552 F.2d 1088 (5th Cir. 1977), and elsewhere, however, Eisen embodies a rule of reason that requires the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The test is whether the cost and burden of an identification effort is justified in light of the results it is expected to produce.

Respondents early on in this litigation asked the government to furnish them with the names and addresses of military personnel (not to mention civilian personnel) who had served in Southeast Asia during the relevant time period. The government responded that the request would necessitate the location and review of the personnel records of each of the millions of persons who served in the Armed Forces from 1961 to 1972, and that the listing of the names and addresses would require a great deal of time and expense and that the manual search of individual records ". . .would take several years to complete at a cost of several million dollars." The status of the military's files are set forth in the affidavit of W. Keith Kavanaugh, dated August 31, 1982 (54a). Mr. Kavanaugh advised (1) the Social Security Administration's records were obsolete; (2) General Services Administration maintained no mailing lists at all; (3) The National Archive lists of ex-servicemen did not show the location of service; (4) the Navy's lists could not show which men were ship-based and which were ashore, for exposure purposes; (5) the Air Force list was obsolete regarding addresses and other details; (6) the MACV ("Military Assistance Command Vietnam") documents, some 40,000 square feet, would yield the names of 170,000 who died in Vietnam, but address information was insecure; and (7) the Veterans' Administration Records were also incomplete, in

some instances outdated, and to some degree inaccurate. Thus, it came as no surprise when counsel for the government advised the court in this case that the VA's discharge system list was of only limited value (63a). In the face of this evidence of the government's incapability of identifying the members of the Agent Orange class, the affidavit of an attorney from the law firm representing petitioner Thompson Chemicals Corp. is hardly persuasive. The effort he suggests is simply outside the parameters of *Eisen*.

The order in the District Court contemplates that actual notice be sent to those actually known. It also provides that as others become identified from state registries or advertisements in the media, they also receive actual notice.

The notice procedures provided for are designed to compensate for the deficiencies of the available government records, and are the best reasonable and practicable notice under the circumstances of this litigation.

The order directs that *Eisen*-type notice be sent to:

— all the 15,000-plus respondents in this litigation;

— the 120,000 names on the Agent Orange Registry, the second best source of names and addresses of injured veterans;

— the lists, if any, of veterans maintained by each of the 50 states.

Petitioners do not dispute the unquestioned superiority of the latter three sources over the "mailing lists" of discharged veterans they discuss. Nor do petitioners dispute the value of the two-step plan media identification — an *Eisen* type notice struc-

tured plan prescribed by the order which is designed to seek out and identify the remaining members of the class to each of whom, upon request, will then be sent the *Eisen* notice.

Petitioners also do not dispute the effectiveness and superiority of the radio and TV as the means of communication best able to reach the maximum number of potential class members through broadcast and telecast of an announcement, whose form, content and timing is controlled by the court. Thus, there is no legitimate complaint about the notice procedures adopted in the courts below.

The complaint concerning the use of media to secure identification of class members is without merit. Identification is simply another task that must be performed in order to send out notice. *Oppenheimer Funds, Inc. v. Sanders,* 437 U.S. 340 (1978). Media use is far from unprecedented. *Payton v. Abbott Laboratories,* 83 F.R.D. 382 (D. Mass. 1979); *Id.,* 86 F.R.D. 351 (D. Mass. 1980); *Dolgow v. Anderson,* 43 F.R.D. 472 (E.D.N.Y. 1968); *In re Scientific Control Corp.,* 80 F.R.D. 237 (S.D.N.Y. 1978); *In re U.S. Financial Securities Litigation,* 69 F.R.D. 24 (S.D. Cal. 1975).

The two-step plan of notification under control of the court satisfies applicable constitutional standards and does not constitute an improper soliciation of claims. *Gulf Oil Co. v. Bernard,* 452 U.S. 89 (1981).

CONCLUSION

There are no grounds compelling or even inviting this Court to issue its writ of certiorari. The case is at an interlocutory stage. The record is barely begun, much less written with that degree of fullness and completion that this Court usually requires before it begins its review. There is no confusion in the circuits that cries out for clarification by this Court, nor is there a clear-cut violation of this Court's precedents that demands immediate rectification. The Court of Appeals had broad discretion as to whether it would issue its extraordinary writ of mandamus. As outlined in this brief, it did not abuse that discretion.

Respectfully submitted,

IRVING LIKE
REILLY, LIKE & SCHNEIDER
Attorneys for Respondents

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 754—August Term, 1983

(Argued January 4, 1984 Decided January 9, 1984)

Docket No. 83-3065

IN RE DIAMOND SHAMROCK CHEMICALS COMPANY, THE DOW CHEMICAL COMPANY, MONSANTO COMPANY, HERCULES INCORPORATED, and T H AGRICULTURE & NUTRITION COMPANY, INC.,

Petitioners,

IN RE "AGENT ORANGE" PRODUCT LIABILITY LITIGATION

Before:

NEWMAN and WINTER, *Circuit Judges*, and MACMAHON, *District Judge*.*

Petition for a writ of mandamus directing the United States District Court for the Eastern District of New York

* Hon. Lloyd F. MacMahon, of the United States District Court for the Southern District of New York, sitting by designation.

(Weinstein, *Chief Judge*) to vacate certification of two classes under Rule 23(b)(1)(B) and (b)(3) of the Federal Rules of Civil Procedure.

Petition denied.

WENDALL B. ALCORN, JR., New York, New York (Cadwalader, Wickersham & Taft, New York, New York), *for Petitioners*.

DAVID JOHN DEAN, New York, New York (Stephen J. Schlegal, Benton Musslewhite & Thomas Henderson, Plaintiffs' Management Committee, Irving Like, Chairman, Law Committee), *for Respondents*.

WINTER, *Circuit Judge*:

This multi-district litigation in the Eastern District of New York involves several hundred actions brought by veterans of the armed forces of the United States, Australia and New Zealand who served in Vietnam at some time during the period 1961 to 1972 and by their spouses, parents and children. Jurisdiction is based upon diversity of citizenship. *In re "Agent Orange" Product Liability Litigation*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981). The plaintiffs claim to have suffered damages as a result of the veterans' exposure to "Agent Orange," a term applied to a group of similar herbicides containing toxic substances used by United States armed forces in Vietnam. The defendant chemical companies allegedly produced Agent Orange with unsafe levels of

the chemical byproduct commonly called dioxin. Plaintiffs' theories of liability inlcude negligence, strict liability, breach of implied warranty, intentional tort and nuisance. They seek compensatory and punitive damages.

On December 16, 1983, Chief Judge Weinstein certified two classes, one pursuant to Fed. R. Civ. P. 23(b)(3) and the other pursuant to Rule 23(b)(1)(B). *In re "Agent Orange" Product Liability Litigation*, ____ F. Supp. ____ (E.D.N.Y. 1983). Familiarity with his Memorandum and Order is assumed. This petition for a writ of mandamus ensued. We deny the petition.

We note again that mandamus is an extraordinary remedy. Thus, "mere error, even gross error in a particular case, as distinguished from a calculated and repeated disregard of governing rules, does not suffice to support issuance of the writ." *United States v. DeStefano*, 464 F.2d 845, 850 (2d Cir. 1972). We note also that this action is "*sui generis*, and national in its proportions" involving an extraordinary constellation of facts, parties and pleadings. *In re Agent Orange Product Liability Litigation, supra* at 995. (Feinberg, C.J., dissenting). Accordingly, it is not a case where mandamus is particularly appropriate because a district court's action is likely to "encourage the use of similar procedures by . . . district courts in the future." *United States v. Dooling*, 406 F.2d 192, 199 (2d Cir.), *cert. denied*, 395 U.S. 911 (1969).

Chief Judge Weinstein certified a class under Fed. R. Civ. P. 23(b)(3)[1] of United States, Australian and New

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1 Rule 23(b)(3) provides:

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * *

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only

Zealand veterans, allegedly injured in Vietnam by Agent Orange, and various members of their families, on the grounds that common issues of law and fact predominated. Specifically, he identified as common issues general causation, failure to warn and affirmative defenses arising out of allegations concerning misuse by the government and federal contract requirements.

The oral argument before us cast considerable doubt upon the significance—not to say existence—of the issue of general causation. As described by plaintiffs' counsel, the issue is limited to whether the many harms alleged could conceivably have been caused by Agent Orange without regard to, or differentiation among, levels of exposure. Defendants' response that anything, even water, can be harmful, would seem to dispose of the issue, so defined, without more. However, our skepticism on this particular score, which may be alleviated by framing the issue in different terms, hardly calls for issuance of the writ since it is clear that common issues relating to the nature of the hazards caused by Agent Orange are directly involved in the parties' various contentions regarding an alleged failure to warn, the defense of misuse and the so-called government contract defense. Plaintiffs' claim that defendants conspired to conceal the dangers of Agent Orange also raises a common issue of fact.

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individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Common issues of fact of considerable significance thus arguably exist. Potentially these include what each manufacturer knew and when it knew it, what each told the government and when it did so, what the government learned on its own and when it did so, what hazards of Agent Orange were known then and are known now, what influence the government exercised over the composition of the herbicide, and what various manufacturers communicated to each other. It is, of course, true that many issues are peculiar to the individual plaintiffs, such as the nature of the exposure to the herbicide, causation of individual ailments, and monetary damages. Whether further subclasses may be possible must be left to the future although it is clear that the residual individual trials will be a considerable task. Nevertheless, it seems likely that some common issues, which stem from the unique fact that the alleged damage was caused by a product sold by private manufacturers under contract to the government for use in a war, can be disposed of in a single trial. The resolution of some of these issues in defendants' favor may end the litigation entirely. Moreover, since these issues may involve extensive documentary and testimonial evidence, Chief Judge Weinstein found that obviating a retrial in countless individual cases will lead to substantial economies in the use of judicial and private resources.

There are thus substantial grounds at this stage to support his conclusion that the common issues predominate and that a class action is the most efficient means of adjudicating them. Moreover, there is no guarantee that a non-class action decision on the common issues favorable either to a plaintiff or to the defendants will be recognized as dispositive in later cases under the doctrine of collateral estoppel as applied in different states. *See, e.g.*,

Standage Ventures, Inc. v. State, 114 Ariz. 480, 562 P.2d 360 (1977) (reaffirming mutuality requirement despite trend toward abolishing it); *Howell v. Vito's Trucking and Excavating Co.*, 386 Mich. 37, 191 N.W.2d 313 (1971) (same). The unique common issues take the case out of the general rule that "[a] 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways." Advisory Committee Note to the 1966 Revision of Rule 23(b)(3), *reprinted in* 39 F.R.D. 69, 103 (1966). *See In re Northern District of California "Dalkon Shield" IUD Product Liability Litigation*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 817 (1983); *Payton v. Abbott Labs*, Nos. 76-1514-S, *et seq.*, slip op., (D. Mass. Oct. 3, 1983); *Delaney v. Borden, Inc.*, No. 82-1853, slip op., (E.D. Pa. July 29, 1983), *Mertens v. Abbott Laboratories*, Nos. C-80-223, *et seq.*, slip op., (D.N.H. July 27, 1983); *Thompson v. Procter & Gamble Co.*, No. C-80-3711, slip op., (N.D. Cal. Dec. 7, 1982); *Ryan v. Eli Lilly & Co.*, 84 F.R.D. 230 (D.S.C. 1979); *McDaniel v. Johns-Manville Sales Corp.*, No. 76-735, slip op., (N.D. Ill. May 31, 1979); *Marchesi v. Eastern Airlines, Inc.*, 68 F.R.D. 500 (E.D.N.Y. 1975).

Chief Judge Weinstein also found that the divergence among states as to choice of law and product liability rules is insignificant and that "a consensus among the states . . . provides, in effect, a national substantive rule governing the main issues in this case." It is, of course, the law of this case that plaintiffs' claims arise under state law *In re "Agent Orange" Product Liability Litigation*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128

(1981),[2] and it is possible that the law of every state and Australia and New Zealand, including choice of law rules, will at some point come into play. While we will not disclaim considerable skepticism as to the existence of a "national substantive rule," we note Chief Judge Weinstein's declared intention to create subclasses as dictated by variations in state law. Given the unique aspects of this case arguably creating a need for a single dispositive trial on the common issues described above, we cannot say that the use of subclasses corresponding to variations in state law is a palpable error remediable by mandamus.

Chief Judge Weinstein also certified a mandatory class under Rule 23(b)(1)(B).[3] Relying upon findings of a Special Master, he found that the defendants' assets are at this time sufficient to meet a judgment for compensatory damages. He reasoned, however, that because punitive damages are designed solely to punish rather than to compensate, courts adjudicating later individual claims would admit evidence as to the payment of punitive damages in prior cases. Since this might induce juries to reduce punitive awards to later claimants, he found that an "adjudication with respect to individual members of

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2 That case did not decide whether potential defenses implicating federal interests such as the government contract defense would be governed by federal or state law.

3 Rule 23(b)(1)(B) provides:

> (b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> • • •
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

the class . . . would as a practical matter be dispositive of the interests of the other members not parties to the adjudication." He then certified a class under Rule 23(b)(1)(B) for the award of punitive damages. Given the large number of potential claimants, estimated by the Special Master to be over 40,000 and given the fact that punitive damages ought in theory to be distributed among the individual plaintiffs on a basis other than date of trial, the argument against his ruling does not justify issuance of a writ of mandamus.[4]

Petitioners also attack Chief Judge Weinstein's provisions for notice to the class, which include written notice to all plaintiffs and intervenors in actions brought in federal courts and to all persons currently listed on the Veterans Administration's "Agent Orange Registry." Provision is also made for requests to radio and television networks and stations to broadcast notice, as well as notice by advertising in a number of newspapers and magazines. Notice is also to be given to the governors of each state who will be requested to notify any state organizations dealing with the problems of Vietnam veterans and then to notify Vietnam veterans identified by such organizations who may be a member of the class.

Chief Judge Weinstein found this to be the best notice practicable under the circumstances, a conclusion which, if not inexorable, is arguably correct, at least before the full results of the advertising and notice to the governors are known.

Review of the many issues raised by the class certification will be available when the ramifications of each aspect of the ruling will be evident. We decide only that the petition for mandamus is denied.

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[4] Subclasses may also be necessary here because of variations in state law governing the award of punitive damages.

PRETRIAL ORDER NO. 87

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MDL No. 381
(All Cases)

In re

"AGENT ORANGE"

Product Liability Litigation.

PRELIMINARY MEMORANDUM ON CONFLICTS OF LAW

APPEARANCES:

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Esposito, Lewis, Overbeck & Furman, Chicago, Illinois; Morton B. Silberman, Clark, Gagliardi & Miller, White Plains, New York

Attorneys for Defendants

WEINSTEIN, Ch. J.:

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A considerable number of Vietnam war veterans resident in all or almost all states, Puerto Rico and the District of Columbia and a number of foreign countries, and members of their families, claim to have suffered injury as a result of the veterans' exposure to herbicides in Vietnam. Defendants produced those herbicides. Individual claims, originally filed in all parts of the country, were transferred for pretrial purposes to this court. Subject to some powers to opt out, common issues presented by plaintiffs' claims will now be tried together since a class has been certified pursuant to Rule 23. *See In re "Agent Orange" Product Liability Litigation,* P.T.O. 72, ____ F.Supp. ____ (E.D.N.Y. Dec. 16, 1983).

Plaintiffs have failed to state a cause of action under federal common law for jurisdictional purposes. *In re "Agent Orange" Product Liability Litigation,* 635 F.2d 987 (2d Cir. 1980), *cert. denied sub nom. Chapman v. Dow,* 454 U.S. 1128 (1981). Accordingly, the litigation is grounded upon diversity jurisdiction raising the issue of what substantive law should apply.

As required by *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 61 S. Ct. 1020, 85 L.Ed. 1477 (1941), this court has examined the conflict of law rules of the states in which the transferor courts sit. *Van Dusen v. Barrack,* 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964). For the reasons set forth below, it is concluded that under the special circumstances of this litigation, all the transferor states would look to the same substantive law for the rule of decision on the critical substantive issues.

I. Introduction

Plaintiffs originally sought to base jurisdiction on federal common law relying on federal question jurisdiction. 28 U.S.C.

§1331. This court sustained their contention. *In re "Agent Orange" Product Liability Litigation*, 506 F.Supp. 737 (E.D.N.Y. 1979). The Second Circuit reversed, concluding, for the purpose of denying federal question jurisdiction, that "there is [no] identifiable federal policy at stake in this litigation that warrants the creation of federal common law rules." 635 F.2d 987, 993, *cert. denied sub nom. Chapman v. Dow*, 454 U.S. 1128 (1981). The court held that if the action was to continue in the federal courts, jurisdiction must be based on diversity of citizenship. 28 U.S.C. §1332.

In applying state law, following what is assumed to be the mandate of *Klaxon*, the choice of law methodology used by the states in which transferor courts sit has been examined to predict what law each state would apply.

We recognize that *Klaxon* has been widely criticized and that learned scholars have suggested on the basis of policy and possible constitutional grounds that a federal conflicts of law rule should be applied in diversity cases such as the one before us. *See, e.g.*, R. Bridwell & R. Whitten, The Constitution and the Common Law 135 (1977); R.C. Cramton, D.P. Currie & H.H. Kay, Conflict of Laws, 927-932 (3d ed. 1981); Hart & Wechsler's The Federal Courts and the Federal System, 713-717 (2d ed. by P.M. Bator, P.V. Mishkin, D.L. Shapiro & H. Wechsler, 1973); W.L.M. Reese & M. Rosenberg, Conflict of Laws, 692, 694-695 (7th ed. 1978); E.F. Scoles & P. Hay, Conflict of Laws 112 (1982); C. Wright, Law of Federal Courts, 366-370 (4th ed. 1983); Hill, The Erie Doctrine and the Constitution, 53 Nw. U. L. Rev. 427, 444-45 (1958); Korn, The Choice of Law Revolution: A Critique, 83 Colum. L. Rev. 772, 971 (1983); Trautman, The Relation Between American Choice of Law and Federal Common Law, 41 Law and Contemp. Prob. 105, 120 (Spring 1977). The Supreme Court

has, however, "made it clear that the *Klaxon* rule is not to yield to the more modern thinking of conflicts-of-laws scholars." C. Wright, *id.* at 368. *See, e.g., Day and Zimmerman, Inc. v. Challoner,* 423 U.S. 3, 96 S.Ct. 167, 46 L.Ed.2d 3 (1975).

Much of law of conflicts is in a state of flux, development and refinement. Any dogmatism as to the result were the issue to be certified to the highest court of each jurisdiction involved is unwarranted. *See, e.g.,* the most current authoritative and comprehensive review of choice of law problems, Korn, "The Choice-of-Law Revolution: A Critique," 83 Colum. L. Rev. 772, 956 (1983). Nevertheless, given the special facts of this litigation, under any approach utilized today, so far as can reasonably be predicted, the result would be the same: each state would probably apply the same law, that is to say either federal or national common law.

Before starting the analysis, it is well to keep in mind the admonishment of Chief Judge Fuld whose "impact upon choice of law has been greater than that of any living judge and probably greater than that of any judge during the present century." Reese, Chief Judge Fuld and Choice of Law, 71 Colum. L. Rev. 548, 548 (1971).

> Justice, fairness and "the best practical result" . . . may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation.

Babcock v. Jackson, 12 N.Y.2d 473, 481, 240 N.Y.S.2d 743, 749, 191 N.E.2d 279, 283 (1963).

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In view of a growing consensus about what the law governing manufacturer's liability is—a problem to be dealt with in a subsequent opinion—there is a convergence between the result required in the instant case under the separate state conflicts of law rules and the separate state substantive tort rules. Thus, the obviously sensible result of treating members of this nation's armed forces and their families in essentially the same way for any injuries suffered in a national war fought on foreign soil would, it is now provisionally found, be reached by each of the states.

The issue is particularly difficult to deal with because of a number of definitional and conceptual issues that tend to make some problems appear more murky than they are. While disclaiming any capacity to clarify the law of conflicts generally, it does seem helpful for purposes of this opinion to restate some definitions and distinctions.

Essentially, there are four different conflicts of laws methodologies used in this country. These may be summarized as (1) lex loci delicti, (2) the Restatement approach, (3) the governmental interest approach, and (4) the Leflar approach. Some states use a combination or variation of these techniques. *See, e.g.*, for various other characterizations of state approaches: R.C. Cramton, D.P. Currie & H.H. Kay, Conflicts of Laws, 326 ff. (3d ed. 1981); W.L.M. Reese & M. Rosenberg, Conflicts of Laws, 478 ff. (7th ed. 1978); Korn, The Choice-of-Law Revolution: A Critique, 83 Colum. L. Rev. 779-780, 819-820 (1983). For purposes of this opinion, we have eschewed specific discussion of the effects of modern doctrine leading to renvoi (*see, e.g.*, W.L.M. Reese & M. Rosenberg, Conflicts of Laws 550 (7th ed. 1978) ("Renvoi Returns")), or the increased likelihood of depecage, applying the law of different jurisdictions to different aspects of the case (R.J. Weintraub, Commentary on the Conflict of Laws 72 (2d ed.

1980)), though, as will be seen, both doctrines are implicated in the present case. Finally, it is unnecessary to consider whether any states' conflict of law rule would deprive a litigant of due process, equal protection, or other constitutional right since each of the states whose conflict rule might apply has sufficient nexus with the matter through residence or the like. *See, e.g.*, R.C. Cramton, D.P. Currie & H.H. Kay, Conflict of Laws, 499-508 (3d ed. 1981); Hart & Wechsler's The Federal Courts and the Federal System, 717-718 (2d ed. by P.M. Bator, D.L. Shapiro, P.J. Mishkin & H. Wechsler, 1973). *Cf. Allstate Insurance Co. v. Hague,* 449 U.S. 302, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981), *discussed in* Currie, The Supreme Court and Federal Jurisdiction: 1975 Term, 1976 Sup. Ct. Rev. 183, 217 (questioning constitutionality), *and* Korn, The Choice-of-Law Revolution: A Critique, 83 Colum. L. Rev. 772, 792-799 (1983).

A. *Federal Law—for jurisdictional purposes; for substantive purposes; for evidentiary and procedural purposes; and as a model for the states to incorporate in their own law.* As already suggested, the Court of Appeals has decided that there is no federal substantive law directly controlling in this case upon which federal question jurisdiction of federal district courts may be based under 28 U.S.C. §1331. Thus, this is not a civil action "arising under the . . . laws . . . of the United States." *Id.* Federal substantive law—that is, the law of the United States Congress, Executive and courts—does not apply by direct authority and compulsion of the federal government and the Supremacy clause of the Constitution. For procedural purposes, however, the federal rules of procedure and evidence apply except in a limited number of instances such as application of state privileges where "State law supplies the rule of decision"—that is, the state's decision controls on what is the substantive law. Federal Rules of Evidence, Rules 101, 501; Federal Rules of Civil Procedure, Rule 1. This means,

for example, that in this case, based upon the predicate of diversity of citizenship jurisdiction, the Federal Rules of Civil Procedure governing class actions control. *See In re "Agent Orange" Product Liability Litigation*, P.T.O. 72, ____ F.Supp. ____ (E.D.N.Y. Dec. 16, 1983) (class action certification).

Even though federal substantive law does not control by its own force, states will often look to non-controlling federal decisions, statutes, executive orders and administrative decisions in deciding what state policy and substantive law ought to be. "The overarching presence of federal law has moved state judges to view federal law . . . as a source of inspiration for the development of a state jurisprudence." The Supreme Court, 1982 Term, 97 Harv. L. Rev. 70, 224 (1983) (commenting on *Michigan v. Long*, 103 S.Ct. 3469 (1983), presuming state decision is based upon federal law in case of ambiguity). Often, then, federal substantive law becomes state substantive law, not because the federal government has willed it so, but because the state has deemed it should be so through its governing institutions including the state's courts.

B. *State Law.* By "state law" we mean the substantive law, as far as it can be predicted to be, devised and enforced by the state within the limits of its constitutional powers. Since this is a diversity jurisdiction case, pursuant to 28 U.S.C. §1332, this court, as to those claims originally filed in this court, sits much as a state trial court would in New York, applying New York substantive law except when, under the New York law of conflicts, a New York court would look to substantive law other than New York's in deciding what substantive law would apply. Cases commenced in other districts are treated as if they are pending in those other districts whether transferred to this court for pretrial purposes under the multi-district litigation statute, 28 U.S.C.

§1407, or transferred for trial for the convenience of witnesses, 28 U.S.C. §1404. *See Van Dusen v. Barrack*, 376 U.S. 612, 84 S.Ct. 805 (1964); W.L.M. Reese & M. Rosenberg, Conflict of Laws, 194-96 (7th ed. 1978); R.J. Weintraub, Commentary on the Conflict of Laws, 584-87 (2d ed. 1980); Note, Choice of Law in the Federal Court after Transfer of Venue, 63 Cornell L. Rev. 149 (1977).

Certifying this as a class action with residents of different states as plaintiffs does not, we assume for present purposes, by analogy to *Van Dusen v. Barrack*, reduce all disputes within the litigation to one subject to the substantive and conflicts of laws rules of New York. This is arguably clear where the suits were begun in other states and transferred to this court under section 1404 or 1407 of Title 28. It also may be assumed to be the case as to those plaintiffs who never brought suit, but became parties as a result of certification pursuant to Rule 23 of the Federal Rules of Civil Procedure. Where relevant state substantive and conflicts rules are not uniform, certification does not, we will assume, provide uniformity. *Cf. Snyder v. Harris*, 394 U.S. 334, 89 S.Ct. 1053 (1969); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 1023; *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938); *In re No. Dist. of Cal. "Dalkon Shield" IUD Product Liability Litigation*, 693 F.2d 847, 850 (9th Cir. 1982), *cert. denied sub nom. A.H. Robins v. Abed*, ___ U.S. ___, 103 S.Ct. 817 (1983).

This assumption is made despite the contrary argument that these class members are subject to New York conflicts law since they constructively sued in the New York case by analogy to Fed.R.Civ. P. Rule 24 (intervention) or Rule 42 (consolidation). Although we do not now accept this argument, it is clear that class action certification provides no added support for applying

conflicts of law rules to require different substantive laws. *Cf. Young v. That Was The Week That Was*, 312 F.Supp. 1337 (N.D. Ohio 1969), *aff'd*, 423 F.2d 265 (6th Cir. 1970) (class action certification, particularly where the law respecting conflicts was not clear, warranted using the law of one state even though members of the class come from many states whose law would apply under traditional conflicts rules).

C. *National-Consensus Law.* While those close to the American law scene tend to emphasize the diversity of substantive law among the states and between the states and the federal government, to outside observers much of the differences must appear as significant as that among the Lilliputans to Swift's hero. Faced with a unique problem, American lawmakers and judges tend to react in much the same way, arriving at much the same result.

There are, of course, centrifugal forces in the law leading to different substantive and procedural results even in a single nation like the United States. With thousands of municipalities, 50 states, the District of Columbia and the Federal jurisdiction having many law-creating legislative bodies, executive departments, administrative bodies, and courts, this is to be expected. Yet, powerful centripetal tendencies often encourage the formulation of national consensus law. First, is the essential homogeniety of one technological-social structure increasingly tied together by national transportation, communication and educational-cultural networks. Second, is an Anglo-American legal system with common roots and a strongly integrated law school educational system with national scholars, treatises and cases. National casebooks and fungibility of teaching materials, for example, create a strong unifying influence making it possible for lawyers to be trained in one section of the country and to transfer to other areas

for practice. It allows development of a national bar examination and national bar even though lawyers are licensed in different states. The result is that law-making and law-applying institutions tend to utilize national standards and approaches.

Institutions such as the American Law Institute with its Restatements, the National Commissioners on Uniform State Laws with many widely-adopted uniform statutes and the National Municipal League with its uniform charters assist in these unifying national tendencies. So, too, do many quasi-public bodies setting manufacturing and safety standards. The pressure, for example, for a uniform manufacturers liability substantive law is well known, having even led the Department of Commerce to draft federal legislation on the subject.

When presented with a new problem, we tend to proceed by analogy and by precedent. Analogies available are much the same for all courts. Even though one state is not bound by the precedents of another, when a new problem arises courts tend to follow the precedents of courts of other American jurisdictions since the reasoning and pool of factual and legal data will tend to be the same.

The concept of a national law already exists in federal common law since federal law, by definition, is created to deal with problems that are national in scope. In determining the content of that federal law courts have long looked to state law sources, the Restatement of Law of the American Law Institute and other "non-federal" sources. *See, e.g., Miree v. DeKalb County,* 433 U.S. 25, 30, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977); *Clearfield Trust Co. v. United States,* 318 U.S. 363, 367, 63 S.Ct. 573, 575, 87 L.Ed. 838 (1943); *Owens v. Haas,* 601 F.2d 1242, 1250 (2d Cir.), *cert. denied,* 444 U.S. 980 (1979); *Southern Pacific*

Transportation Co. v. United States, 462 F.Supp. 1193 (E.D. Cal. 1978); *Weinberger v. New York Stock Exchange*, 335 F.Supp. 139, 143 (S.D.N.Y. 1971).

II. *Claims of Defendants and Misunderstanding of Posture of Case*

With this general background we may now examine defendants' contentions that the Court of Appeals' decision that plaintiffs did not state a cause of action under federal common law forbids this court from using any single rule of substantive law. They argue in summary that (1) federal common law may only be applied where there is a substantial federal interest at stake, (2) the Second Circuit's decision constitutes a determination binding on this court that there is no such federal interest in this litigation, (3) therefore, although they do not suggest any rational way by which a state may choose one state's law to apply, they conclude that this court may not apply federal or national consensus common law to any issue. Further, they suggest that there is no single national consensus substantive law (although at least one defendant on oral argument urged that the government contract defense rested on national consensus).

Defendants misstate the holding of the Court of Appeals. That decision was jurisdictional only—*viz.* that the federal courts did not have jurisdiction under 28 U.S.C. §1331. It did not constitute a determination that the state courts could not look to other law, whether state, federal, or national consensus, if their choice of law rules so dictated. There is no necessary congruity between the basis for competence of a court and the basis for choice of law. *Cf.* Korn, The Choice-of-Law Revolution: A Critique, 83 Colum. L.Rev. 772, 781-787 (1983) (relation between choice of law bases and in personam jurisdiction bases). Nor did

the Court of Appeals decide that there was no substantial federal interest in the case; on the contrary, it is clear from the opinion that it did not disagree with this court's conclusion that there are "substantial federal interests that would be adversely affected by application of state law to the instant claims and . . . that there [are] no substantial state interests in having state law applied." 635 F.2d at 991. *See id.* at 993 n.11. Rather, the Court of Appeals found that although the federal government had an interest in both the plaintiffs as former serviceman and the defendants as defense contractors, those "two interests have been placed in sharp contrast with one another." *Id.* at 994. Because of this clash and the fact that "the federal government['s] . . . interest in the *outcome* of the litigation, *i.e.* in how the parties' welfares should be balanced, is as yet undetermined," *id.* at 995 (emphasis in original), the court determined that there was no "significant conflict between [identifiable] federal policy or interest and the use of state law." *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68, 86 S.Ct. 1301, 1304, 16 L.Ed.2d 369 (1966), *quoted in Agent Orange*, 635 F.2d at 993. As a result, the strict requirements for the application of federal common law of its own force were not met.

It should also be recalled that the Second Circuit's holding was premised at least in part on the fact that the claims "do not directly implicate the rights and duties of the United States" and that "no substantial rights or duties of the government hinge on the outcome." 635 F.2d at 993. While not decisive in connection with the instant conflicts of laws opinion, that is no longer true. As will be demonstrated in a forthcoming opinion, the government is a third-party defendant at least as to those claims alleging independent injury to wives, as by miscarriages, and to children, as by genetic damage.

The difference between federal law applying of its own force under the Supremacy Clause, which the Second Circuit's decision forbids, and applying a form of national consensus law or of federal law itself because a state court chooses to look to it as the rule of decision is well accepted. For example, state courts, in interpreting their state's constitution and statutes, will often follow the federal constitution and statutory authority although they may not be required to do so. *See, e.g., Jankovich v. Indiana Toll Road Comm'n,* 379 U.S. 487, 85 S.Ct. 493 (1965) (Indiana Supreme Court's holding based on state constitutional grounds although elaborate use made of federal authority); *Beeland Wholesale Co. v. Kaufman,* 234 Ala. 249, 260, 174 So. 516 (1937) (state court, upon direction of state legislature, passed on contention that federal statute was invalid because Ala. 1981) (applying federal law for identical claim because of Supremacy Clause). *Cf. Southern Pacific Transp. Co. v. United States,* 462 F.Supp. 1193, 1213-14 (E.D. Cal. 1978) (although Federal Tort Claims Act provides that state law is to be applied, if state would look to federal law, federal law will apply). Similarly, a state in applying a sister state's law, will generally do so as a matter of policy, not because the federal Constitution compels such application.

It is also noteworthy that federal courts applying federal law in exercising federal question jurisdiction often look to state law to fill in large substantive gaps as in civil rights (42 U.S.C. §1983) and other cases. *See, e.g.,* cases collected in *Wahba v. H. & N. Prescription Center,* 539 F.Supp. 352, 357-358 (E.D.N.Y. 1982). *Cf. Thompson v. Village of Hales Corners,* ___ Wis. ___, 52 LW 2339 (Nov. 30, 1983) (in determining damages under §1983, state court applies federal law which incorporates state law except when state law is incompatible with federal policy).

This free interchange of federal and state law and the reliance on a common American fund of legal concepts is to be excepted. We are, after all, as already noted, a single nation whose lawyers and judges think of themselves as members of a single American profession, with a common jurisprudence and a homogeneous society. Analytically, the difference between ruling federal and state substantive law is precise; in practice, the distinctions are often blurred or nonexistent.

III. *Conflict of Laws Rules*

While there are a number of analogous approaches and decisions, none is directly on point in connection with the special conflicts of law issue now posed. Accordingly, since "no clearly discernable and clearly applicable conflicts rule has been announced by the . . . state, the rule must be hypothesized to correspond with all available indices of what the rule would be if presently formulated" by the state courts. *Stemple v. Phillips Petroleum Co.*, 430 F.2d 178, 183 (10th Cir. 1970).

Modern approaches, although differing in their formulations, mandate an analytical inquiry which is essentially the same. As Professor Leflar put it:

> [I]t appears that the various scholarly views concerning choice of law, developed during the last couple of decades, are being accepted by the courts as though they constituted one somewhat multi-faceted approach to the subject. Essentially, they are consistent with each other. Any one of them is likely to produce about the same result on a given set of facts as will another.

> The point to be emphasized is that the modern decisions, regardless of exact language, are substantially consistent with each other.

Leflar, American Conflicts Law, §109, p. 218 (3d ed. 1977). *See also In re Air Crash Disaster Near Chicago, Ill. on May 5, 1979,* 644 F.2d 594, 610 (7th Cir. 1981). The Restatement Second is the most comprehensive of the modern approaches. *See* Leflar, Choice of Law: State's Rights, 10 Hofstra L. Rev. 203, 206 (1981). To the extent that they differ from the current Restatement, other approaches are analyzed below.

A. *Restatement*

Section 6 of the Restatement (Second) of Conflicts sets forth the general principles to be applied by a court in deciding what substantive law to apply. It requires a comprehensive analysis of many interlocking local and national policies whenever a new problem is posed:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rules of law include
>
> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Section 145 of the Restatement lists the facts to be considered when applying the principles of Section 6 to a torts case. They include a wide array of relationships of the parties and their contacts with various jurisdictions:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in §6.

(2) Contacts to be taken into account in applying the principles of §6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

While individual factors must be analyzed, "the 'most significant relationship' analysis should not turn on the number of contacts but more importantly on the qualitative nature of those contacts as affected by the policy factors enumerated in Section 6." *Gutierrez v. Collins*, 583 S.W.2d 312, 319 (Tex. 1979).

Applying the contacts enumerated in section 145(2) to the facts of this litigation reflects their widespread geographical location and fortuity. Injuries arguably occurred in the fifty states and other places where the plaintiffs now live or at one time lived. The original exposure to Agent Orange was at a variety of places in and near Vietnam—*i.e.*, South Vietnam, Cambodia and Laos. The conduct causing the injury was the manufacture of Agent Orange by the defendants and the alleged failure by the defendants to warn the government of the dangers of Agent Orange. Agent Orange was manufactured in factories in New Jersey, Michigan, Arkansas, West Virginia, Missouri and Canada, and perhaps Germany and elsewhere. The basic decision to use it was made in and around Washington, D.C. and in South Vietnam by our

government officials and those of South Vietnam. The companies responsible for its manufacture are incorporated and have as their main place of business the states of Delaware, New Jersey, Ohio, Michigan, Delaware, Missouri, Kansas and Connecticut. It is difficult to pinpoint any particular states as the location of the failure to warn since what is alleged is inaction, not action. However, the meetings and conferences which plaintiffs allege furthered what they refer to as the "conspiracy of silence" took place in the various states where defendants have their principal place of business. Other states with relevant contacts include Pennsylvania and Texas, where the Herbicide Management Team of the United States armed forces was located, Alabama and Mississippi, the states from where the Agent Orange was shipped, and South Vietnam, where it was stored and used. Adding to the factual complexity is that of mixture. The products manufactured were so mixed and so labeled that it is not possible to determine which manufacturer's product was used at any time or place.

The Restatement's comment on §6(b) distinguishes "the forum [that] has no interest in the case apart from the fact that it is the place of the trial of the action," from "the forum [that] has an interest in the case apart from the fact that it is the place of the trial." In the former, the policies behind the substantive law of the forum will be irrelevant. Restatement of Conflicts (Second), §6, comment e. Thus, for those cases in which neither the plaintiff nor the defendant has any significant contact with the state other than the fact that suit was filed in that state, that state's policies will not be considered. For those cases in which parties do have a significant contact with the forum such as the residence, place of business or state of incorporation of the parties, the policies behind the substantive laws must be considered. The three most important issues whose policies must be analyzed for

this preliminary conflicts-of-laws opinion are products liability, the government contract defense and punitive damages. The articulation of the substantive rules relating to these issues will be restated in a more refined form in subsequent decisions; a rough approximation of these rules for the purposes of this conflicts opinion suffices.

1. *Product Liability Law*

Virtually, all, if not every one, of the states in question has adopted some form of products liability law either by caselaw or by statute. The general policy behind such a rule of law is the oft quoted statement in *Greenman v. Yuba Power Products, Inc.*, 39 Cal.2d 57, 27 Cal. Rptr. 697, 700, 377 P.2d 897, 900 (1962): "The purpose of such liability is to ensure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." Products liability law generally will be treated at greater length in a subsequent opinion. For the moment, it is enough to say that much the same considerations controlling choice of law in the government contract defense, discussed at length below, apply to product liability law generally. They tend to lead to application of a law of national consensus.

2. *Government Contract Defense*

Although the government contract defense has long been applied by the state courts, few decisions have faced the question of how the defense applies to a claim of products liability. The "government contract defense" has two forms: the "contract specification" defense and the "government contract" defense. Under the former, a manufacturer is insulated from liability if

it manufactured the product in accordance with government specifications, unless those specifications were so obviously defective that a competent manufacturer would have refused to follow them. Under the latter, a manufacturer's compliance with government specifications is a complete defense to any action based on defective design. *See* Note, Liability of a Manufacturer for Products Defectively Designed by the Government, 23 Boston College L. Rev. 1023, 1085 (1982).

Two state courts have recently had occasion to discuss the government contract defense in the context of a strict liability action involving allegedly defective military products. *See Sanner v. Ford Motor Co.*, 144 N.J. Super. 1, 364 A.2d 43 (1976), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (1977), *cert. denied*, 75 N.J. 616, 384 A.2d 846 (1978); *Casabianca v. Casabianca*, 104 Misc.2d 348, 428 N.Y.S.2d 400 (Sup.Ct. 1980). In allowing the defense, the *Sanner* court reasoned that imposing liability "would seriously impair the governments [*sic*] ability to formulate policy and make judgments pursuant to its war powers." *Sanner*, 144 N.J.Super. at 9, 364 A.2d at 47. New York embraced much the same policy in *Casabianca*, allowing the defense even though the manufacturing believed the design imprudent and dangerous.

Two related policies have been expressed by other state courts in allowing the government contract defense in other contexts. The first views the government contract defense as following from the notion of sovereign immunity. As the court in *Valley Forge Gardens, Inc. v. James D. Morrissey, Inc.*, 385 Pa. 477, 483-84, 123 A.2d 888, 891 (1956), put the matter:

> [I]f the contractor, in privity with the state or with its instrumentality, performs the contract work which the state is privileged to have done, . . . the

> contractor [is relieved] from liability to third persons except for negligence or willful tort in performance of the work.

The second policy has been referred to as the "efficiency" rationale, *i.e.*, that the defense is necessary to ensure the smooth operation of government procurement programs:

> [I]f the rule were otherwise, "the bidding on the contracts with a [governmental instrumentality] would be somewhat hazardous, because the contractor could never know what the amount of damage which he might have to pay . . . would be."

Valley Forge, 385 Pa. at 484, 123 A.2d at 891-92 (citations omitted). *See also McCabe Powers Body Co. v. Sharps*, 594 S.W.2d 592 (Ky. 1980); *Hunt v. Blasius*, 55 Ill.App.3d 14, 370 N.E.2d 617, 621-22 (1977), *aff'd on other grounds*, 384 N.E.2d 368 (1978).

Other courts, however, have rejected the government contract defense, at least where the claim was grounded in strict product liability. *See Challoner v. Day and Zimmerman, Inc.*, 512 F.2d 77, 84 (5th Cir.) (applying Texas law), *rev'd on other grounds*, 423 U.S. 3, 96 S.Ct. 167, 46 L.Ed.2d 3 (1975); *Johnston v. United States*, 568 F.Supp. 351, 356-359 (D. Kan. 1983) (applying Kansas law); *see also* Note, 48 U. Chi. L. Rev. 1030 (1980). Those courts reason that the contract specification defense, having its source in ordinary negligence, does not apply to actions grounded in strict liability. As to the government contract defense proper, those courts that deny the defense in strict liability cases tip the balance in favor of the injured plaintiff rather than the contractor, asking:

> On what principled ground . . . could it be justified that the cost of manufacturing defects will be passed along, through higher contract prices to the government to all of us who are taxpayers, while the design defect "tax" will fall only on a few unfortunate, innocent, randomly selected victims?

Johnston, 568 F.Supp. at 357.

Having analyzed, under Restatement §6(2)(b), the relevant policies of the various forum states, it is necessary to select the law of one of those fora to be applied to one or more of the substantive issues in this litigation. It has already been pointed out that the defendants' principal places of business are in seven different states, that the Agent Orange was manufactured in at least six others and Canada, and that at least six other states, the District of Columbia and South Vietnam, have had contacts relevant to the conduct causing the injury, a total of at least twenty-one jurisdictions. If to these jurisdictions are added the states and counties which bear much of the expense of caring for the service people, spouses and children who need public assistance, the number of jurisdictions far exceeds fifty. (This complexity is compounded by the fact that at least three of the foreign countries involved—Canada, Australia and New Zealand—are themselves federal republics with federal-state issues not unlike our own.)

The class action nature of the litigation, as already indicated, will not be assumed to control the choice-of-law aspect of the case. Nevertheless, a state court passing on the claims of an individual or a group of veterans might well recognize the unfairness in treating differently legally identical claims involving

servicemen who fought a difficult foreign war shoulder-to shoulder and were exposed to virtually identical risks. As the Supreme Court stated in a related context, because "the Armed Services perform a unique, nationwide function in protecting the security of the United States," it makes "little sense for the Government's liability to members of the Armed Services [to be] dependent on the fortuity of where the soldier happened to be stationed at the time of his injury." *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 671-72, 97 S.Ct. 2054, 2058, 52 L.Ed.2d 665 (1977). Similarly, it would make little sense to have a serviceman's recovery (or that of a spouse or child) in this suit depend on the fortuity of where he manifested his injuries or where he filed suit.

It quickly becomes apparent that it is impossible through sensible application of choice of law doctrine or analysis to identify the interest of any one state as being sufficiently greater than any others to a degree sufficient to justify the application of that state's law in resolving the issues in this litigation. Any narrow and mechanical state choice of law system simply collapses under the weight of the multiplicity of contacts, policies and unarticulated or conflicting state interests in this unique case. A state court, therefore, because of its inability to identify and select any other state's law to be applied as the rule of decision, would seek to divine what the national rule of decision will regard to product liability law would be so that such law would appropriately reflect the national and international characteristics of this case. By contrast, the application of an individual state's law rather than a national consensus law would be irrational and unfair.

The use of a national common law is also justified by Restatement of Conflict of Laws (Second) § 6(2)(c), which requires an analysis of "the relevant policies of other interested states and the relative interest of those states in the determination of the

particular issue." The other interested state whose interest and policies must be considered is, of course, the United States, which, under § 3 Comment (c) of the Restatement, "is a state in the sense here used as to matters that are governed by federal law."

The policies of the United States, broadly speaking, parallel the states': on the one hand, it has a policy of compensating servicemen who are injured in the course of military service. On the other hand, there is the policy expressed by the government contract defense of insulating defense contractors who merely produced military equipment according to the specifications set forth by the government. *See McKay v. Rockwell Intern. Corp.*, 704 F.2d 444, 448-451 (5th Cir. 1983), *cert. denied*, —U.S.L.W.— (Jan. 9, 1984) (No. 83-754). How the balance should be struck in this case between those two conflicting policies need not be decided at this point. What is important is that these federal policies are far more specific than those of the states and the national interest in this litigation is far greater than that of any individual state. *See McLaughlin v. Sikorsky Aircraft* 195, Cal. Rptr. 764, 768 (Cal. App. 1983) federal law applies to the government contract defense).

While inchoate, the sense of the nation's interest is paramount to any state's. In matters affecting the nation as a whole, the concept of a single nation with interests overriding those of any state on some matters has never been doubted since the Civil War. Judges cannon blind themselves to what every reasonable citizen of the country absorbs from the cultural brew he or she imbibes from childhood, that help shape intellectual and emotional fibers. Judges, law professors and lawyers are no different from others in this respect. Seldom will the law they apply depart from the sense of the situation that the facts of the real world present.

Order

This suit involves tens of thousands of servicemen and their wives and children alleging injury abroad in time of war as a result of a military decision. As opposed to the general policy behind products liability which encompasses all those injured by defective products, there is a far more specific federal policy of ensuring compensation for injured members and veterans of the armed forces. *See* 10 U.S.C. § 1071-87 (program of medical care for members of uniformed services and dependants); 38 U.S.C. § 310-15 (schedule of compensation to veterans and dependants for wartime disabilities); § 321-22 (schedule of compensation to survivors of veterans for wartime death), § 331-35 (same peacetime disabilities), § 43-42 (same peacetime death).

For much the same reasons, the national interest is far greater than that of the individual states. While the individual states may have a general interest in having their citizens recover of its chemical companies protected from liability, the nation as a whole has a far more specific interest in both the plaintiffs, as servicemen, and the defendants, as government contractors. As to the plaintiffs, as the Supreme Court observed in *United States v. Standard Oil Company,* 332 U.S. 301, 67 S.Ct. 1604, 91 L.Ed. 2067 (1947):

> Perhaps no relation between the government and a citizen is more distinctively federal in character than that between it and members of its armed forces. To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or non-federal governmental agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the government are fundamentally derived from

> federal sources and governed by federal authority. *See Tarbble's Case,* 80 U.S. 397, 13 Wall. 397, 20 L.Ed. 597; *Kurtz v. Moffitt,* 115 U.S. 487, 6 S.Ct. 148, 29 L.ed. 458. So also we think are interferences with that relationship such as the facts of this case involved. For, as the Federal Government has the exclusive power to establish and define the relationship by virtue of its military powers, equally clearly it has power in execution of the same functions to protect the relation once formed from harms inflicted by others.

Id. 332 U.S. at 305-306, 67 S.Ct. at 1606-1607 (footnotes omitted). *See also Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 671-72, 97 S.Ct. 2054, 2058, 52 L.Ed.2d 665 (1977).

There is as well a specific interest which individual states would hardly ignore. It inheres in the possible liability of the defendants, as contractors, to the soldiers and members of their families. As the Supreme Court stated in *Stencel Aero,* "[t]he relationship between the Government and its suppliers of ordnance is certainly no less 'distinctively federal in character' than the relationship between the Government and its soldiers." 431 U.S. at 672, 97 S.Ct. at 2054.

Moreover, ordinarily federal law controls the construction and applicability of government contracts. *Priebe & Sons, Inc. v. United States,* 332 U.S. 407, 68 S.Ct. 123 (1947). *See also American Houses, Inc. v. Schneider,* 211 F.2d 881 (3d Cir. 1954); Note, The Choice of Law, State or Federal, in Cases Involving Government Contracts, 12 La. L. Rev. 37, 55 (1951) ("the trend seems to indicate clearly that 'federal common law' will be applied in those cases involving government contracts").

The existence and scope of a contractor's liability, if any, will undoubtedly affect future dealings between the contractor and the government. For example, war contractors may increase the price of war materials to reflect their potential liability. They may balk at supplying the military with particular products. As a result, the government's military capabilities may be affected. In addition, the importance of large government war contractors to the national economy implicates a national interest transcending state boundaries. Defendants, who include many of the nation's largest chemical manufacturers, face claims which may result in billions of dollars in liability. The sudden onset of substantial liabilities, even if they fell short of defendants' total asserts, may affect national interests both in the sense that it would seriously affect the national economy. Furthermore, this litigation involves defoliants and other toxic chemicals whose use and misuse are increasingly governed by federal law. *See, e.g.,* the Toxic Substances Control Act, 15 U.S.C.§ 2601, *et seq.;* the Hazardous Materials Transportation Act, 49 U.S.C. § 1801, *et seq.;* the Dangerous Cargo Act, 96 U.S.C. § 170; the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9605, *et seq.;* the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136, *et seq.; the Resource Conservation Recovery Act, 42 U.S.C.* § 6901, *et seq.* Comprehensive federal legislation, has in large part, taken these products out of the domain of state regulations.

3. *Punitive Damages*

The third issue of substantive law whose policies must be analyzed for choice-of-law purposes is punitive damages. The states of the veterans' domicile do not have an interest in whether or not punitive damages are imposed on the defendants. The legitimate interests of those states are limited to assuring that the

plaintiffs are adequately compensated for their injuries and that the proceeds of any award are distributed to the appropriate beneficiaries. *See, e.g., In re Air Crash Disaster Near Chicago, Ill. on May 25, 1979,* 644 F.2d 594, 612-613 (7th Cir. 1981); *Roginsky v. Richardson-Merrell, Inc.,* 378 F.2d 832 (2d Cir. 1967); *Hurtado v. Superior Court,* 11 Cal.3d 574, 584, 114 Cal. Rptr. 106, 112, 522 P.2d 666, 672 (1974). The only jurisdictions concerned with punitive damages are those, including the federal government, with whom the defendants have contacts significant for choice of law purposes. Those contacts include defendants' place of incorporation, principal place of business, location of the plants that manufactured Agent Orange, and the site of any action taken in furtherance of what plaintiffs refer to as "the conspiracy of silence."

The purposes underlying the allowance of punitive damages are punishment of the defendant and deterrence of future wrongdoing. The purpose underlying the disallowance is protection of defendants from excessive financial liability. *See, e.g., Chicago Air Crash Disaster,* 644 F.2d at 613; *Forty-Eight Insulations, Inc. v. Johns-Mansville Products,* 472 F.Supp. 385 (N.D. Ill. 1979); *Pancotto v. Sociedada de Safaris de Mocambique, S.A.R.I.,* 422 F.Supp. 405 (N.D. Ill. 1976).

Courts disagree as to whether, as between the place of misconduct and the primary place of business, the former or the latter has the greater interest in awarding punitive damages. *Compare Jackson v. K.L.M.,* 459 F.Supp. 953 (S.D.N.Y. 1978) *with Chicago Air Crash Disaster,* 614 F.2d at 614-15. It is not necessary to decide that question for purposes of this litigation. The same reasons that justified the application of a single national consensus law to the government contract defense and to the standard of liability in this product liability case apply to the

question of punitive damages. There is no rational method by which a state court could choose the law of any one state to govern the issue. The allegedly wrongful activity has contacts significant for choice of law purposes with at least twelve different jurisdictions. The Agent Orange was manufactured in at least New Jersey, Michigan, Arkansas, West Virginia, Missouri and Canada; the companies that manufactured it have their principal places of business in Ohio, Michigan, Delaware, Missouri, Kansas, and Connecticut; the meetings and conferences which furthered the alleged "conspiracy of silence" took place in the states where defendants have their principal places of business.

On the other hand, there is an overriding federal interest in the award of punitive damages. The federal government is interested in the defense contractors' continued willingness and ability to supply material vitally needed for the national defense. The government also has an interest in assuring that defective war material does not injure American soldiers. How the balance should be struck in this case need not be decided now. It is enough to recognize that the federal government's interest parallels its interest in the defendants as war contractors, outlined above, and is demonstrably greater and more specific than the interest of any individual state.

B. *Governmental Interest Approach*

Under the governmental interest approach, the court must consider whether the public policy of a particular legislature would be furthered, frustrated or is irrelevant if applied in the case at bar. The law of the forum will be displaced only if the policy of the legislature of another forum has a stronger interest. *See generally* Currie, Notes on Methods and Objectives in the Conflict of Laws, 1959 Duke L.J. 171; Sedler, The Governmental Interest

Approach to Choice of Law, An Analysis and a Reformulation, 25 U.C.L.A. L. Rev. 181 (1977). What was said above in connection with the discussion of the Restatement approach applies to an analysis of the application of the governmental interest analysis. It makes no difference whether this litigation poses a false conflict or a true conflict. There is no rational method by which a state could choose one state's law to govern some or all of the issues in the case and a state would look to a single national common law. Furthermore, as noted above, "the legislature of another forum," in this case the United States, has a far stronger interest than the legislature of any other forum.

C. Leflar Approach

The Leflar approach requires that a court take into account "five choice-influencing considerations" and weigh each consideration in the light of the specific facts, with no more intrinsic importance attached to any consideration than to another. *See generally* R. Leflar, American Conflicts Law, §96 (3d ed. 1977); Leflar, Choice-Influencing Consideration in Conflicts Law, 41 N.Y.U. L. Rev. 267, 269 (1966). Those five considerations include predictability of legal result, maintenance of interstate order, simplification of the judicial task, the forum's governmental interests and a preference for application of the better law. The only relevant consideration which has not thus far been discussed is the fifth, a preference for application of the better rule of law. This last factor calls into play the notion of the national law as the "more progressive" law and possibly provides further support for the application of federal common law. Professor Korn's critical analysis of both the Leflar and Currie departures from the Restatement approach suggests that neither of them would have much impact in a case such as this. Korn, The Choice-of-Law Revolution: A Critique, 83 Colum. L. Rev. 772, 811 ff., 965 ff., 958-960 (1983).

D. *Lex Loci Delicti*

As with the states using the Restatement, governmental interests, and Leflar approaches, lex loci states have never been faced with a case involving the number and quality of different state contacts presented by this litigation. Any conclusion, therefore, as to what such a state would do must, of necessity, be somewhat hypothetical. Nevertheless, we can conclude that the lex loci states would apply a federal or national consensus common law. As Professor Korn points out, even when "the lex loci delicti remains the general rule in tort cases [it may be] displaced . . . in extraordinary cases." Korn, The Choice-of-Law Revolution: A Critique, 83 Colum. L. Rev. 772, 957 (1983).

Under the Restatement (First) of Conflicts, which embodies the *lex loci* approach, the general rule is that the law to be applied is the law of "the place of the wrong," Restatement (First) §377. The "place of the wrong," in turn, is defined in personal injury cases to be "the place where the harmful force takes effect upon the body," *id.* Note 1. In this case, that would be South Vietnam, Laos or Cambodia as to the members of the Armed Forces and a variety of states and countries as to spouses and children. Although many of the more serious symptoms did not manifest themselves until years later, the "harmful force [took] effect upon the body" immediately. Therefore, the exception of §377 Note 2, which states that "when a person causes another voluntarily to take a deleterious substance . . . the place of the wrong is where the deleterious substance takes effect and not where it is administered," does not call for a different result here.

Although the lex loci approach would normally look to South Vietnam, Laos, or Cambodia as the place of the wrong to the servicepeople, none of the parties have argued that the laws of

those countries should be applied, even if their contents could be proven. The theory behind lex loci is that "[e]ach state has legislative jurisdiction [*i.e.*, power] to determine the legal effect of facts done or events caused within its territory." §377 Comment a. That rationale does not apply here: the jurisdiction where most of the use of herbicides took place, South Vietnam, no longer exists and Cambodia appears to be an independent state in name only now taken over by Vietnam. North Vietnam, the jurisdiction that has replaced South Vietnam and Cambodia, was at war with the United States and it was in the prosecution of the war that the exposure to Agent Orange took place. It would be ludicrous to allow North Vietnam (or France or the Soviet Union, whose laws undoubtedly have a strong influence on Vietnamese jurisprudence) to determine the law of this case.

Even if it is argued that the alleged adverse effects of exposure to Agent Orange did not manifest themselves until after the veterans returned from Vietnam and thus, the normally applicable Restatement (First) rule is that the law of the state where those first manifestations occurred would apply, it is still probable that a state court would apply federal or national consensus law to all substantive issues in the litigation. The fact that a state uses the *lex loci* approach in most cases does not mean that it is immune to arguments based on the relative interests of jurisdictions. Thus, for example, a number of states that generally apply the *lex loci* approach in tort cases will apply the law of the parties' domicile to the issue of spousal immunity on the theory that "the domiciliary's overwhelming interest in the spousal relationship requires deference to its law in determining the applicability of spousal immunities." *Tucker v. Norfolk & W.R. Co.*, 403 F.Supp. 1372, 1373 (E.D. Mich. 1975), *quoted with approval in Sweeney v. Sweeney*, 262 N.W.2d 625, 628 (Mich. 1978). *See also Williams*

v. Williams, 369 A.2d 669 (Del. 1976) (parental immunity), N.C. Gen. Stat. §52-5.1 (1967) (interpersonal immunity).

This pragmatic application of lex loci is particularly likely here where the jurisdiction with the greater interest is the federal government. As already pointed out, states have long looked to federal law for the rule of decision in particular cases even though it was not mandated by the Supremacy Clause.

The rationale given by state courts for adhering to the *lex loci* approach does not apply here. As the Supreme Court of Virginia stated in refusing to abandon the *lex loci* approach, "the components of the [modern approaches] can be viewed differently from case to case, thereby creating uncertainty and confusion in the application of the theory. . . . Thus, we do not think that the uniformity, predictability, and ease of application of the [*lex loci*] rule should be abandoned in exchange for a concept which is so susceptible to inconstancy . . ." *McMillan v. McMillan*, 253 S.E.2d 662, 664 (Va. 1979). When the choice is between forum law and a federal or national consensus law as distinguished from a choice between forum law and a sister state's law, that danger of "inconstancy" does not exist. For close to two hundred years, state courts have had to choose between federal and state law in a particular case based not on *lex loci*, but on the relative interests of the state and federal governments in the case. Most of the decisions to apply federal law were made because the court viewed the application as mandated by the Supremacy Clause. Nonetheless, the same factors that decide whether federal law controls under the Supremacy Clause suggest whether it or national consensus law should control as a matter of choice of law. Finally, the *sui generis* nature of this litigation means that application of federal or national consensus common law to this litigation would not require a wholesale abandonment of *lex loci* in exchange for "a concept which is so susceptible to inconstancy."

E. *Forum Law*

The decision to apply a national law is further reinforced by an analysis of what a court does when its choice of law rules point to foreign law and that law is not pleaded or proved by the parties. In such cases, a court will generally apply forum law or dismiss the case. Alexander, The Application and Avoidance of Foreign Law in the Law of Conflicts, 70 Nw. U. L. Rev. 602 (1975). As will be seen, the various reasons given for application of forum law or dismissal do not apply here; rather, the relevant decisions of the various states indicate that they would look to federal or national consensus law.

Clearly, dismissal is not warranted by the failure to plead and prove the content of foreign law. *See, e.g.*, the widely criticized *Walton v. Arabian American Oil Co.*, 233 F.2d 541 (2d Cir. 1956) (dismissed for plaintiff's failure to prove content of Saudi Arabian law), discussed in, *e.g.*, E.F. Scoles & P. Hay, Conflict of Laws, 412-13 (1982); W.L.M. Reese & M. Rosenberg, Conflict of Laws, 384-91 (7th ed. 1978). Neither side has argued for the application of Vietnamese law.

If a court does not dismiss a case for failure to prove foreign law, it will generally apply forum law. Two rationales are given for this. The first is that the court will presume that the foreign law is identical to the forum's law. *See, e.g., Louknitsky v. Louknitsky*, 123 Cal. App.2d 406, 266 P.2d 910 (1954) (presumption that Chinese marital property law is identical to California law). Other courts eschew presumptions and apply the law of the forum because no one has shown why it ought to be displaced. As *Leary v. Gledhill*, 8 N.J. 260, 84 A.2d 725 (1951), stated the matter: "the parties by failing to prove the law of France have acquiesced" in the law of the forum. Neither rationale is

applicable here. There is no reason to apply foreign law and therefore no reason to presume that foreign law is identical to forum law. As to the latter approach, it has been clearly shown in this litigation why the law of the forum should be displaced in the face of the overwhelmingly national and federal aspects of the case. A state court in such a position, having no preexisting applicable conflicts rule, would turn to federal or national consensus law.

It has been suggested that a state court, no matter what choice-of-law methodology it uses, faced with a case involving the extensive federal interests and multiplicity of state contacts, would apply forum law out of lack of any rational alternative. There is no need to fall back on this alternative of desperation. *Cf.* criticism of choice-of-law predicated primarily upon the choice of forum in Korn, The Choice-of-Law Revolution: A Critique, 83 Colum. L. Rev. 772, 959 *and passim* (1983). First, state law has not considered the complex question of a war contractor's liability to soldiers injured by toxic chemicals subject to federal regulation while engaged in combat and serving abroad. Second, a state with only a tangential connection to the litigation which has the choice of applying a far more relevant federal or national consensus common law will not apply a body of law to a case merely because the law happens to be that of the forum. *Cf. Henry v. Richardson-Merrell, Inc.*, 508 F.2d 28 (3d Cir. 1975) (refusing under *Klaxon* to apply New Jersey's strict product liability law because of the lack of that state's connection to the case); *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 305 A.2d 412 (1973).

F. *National Consensus Restated*

At most, a state's contacts in an "Agent Orange" suit would consist of the individual plaintiff veteran's residence in that state—

a factor readily subject to change in our transient society—and the fact that one of the seven defendant companies is either incorporated or manufactured its Agent Orange in that state. At the risk of restating the obvious, those contacts are dwarfed by the national contacts in the case. The only jurisdiction with which all elements in the litigation undoubtedly have significant contacts, and the only unifying factor, is the nation. But for the fact that arguably the federal government has not allowed itself to be sued, federal law might apply under *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943); *see In re "Agent Orange" Product Liability Litigation*, 635 F.2d 987, 993 (2d Cir. 1980), *cert. denied sub nom. Chapman v. Dow*, 454 U.S. 1128 (1981).

The application of a federal or national consensus common law to all substantive issues is consistent with the relevant decisions of the state courts and the federal courts sitting as state courts under *Erie* and *Klaxon*. Although the national and international contacts and interests present in this case are far greater, in both quantity and quality, than that of any heretofore decided, a number of state and federal courts have had occasion to deal with choice of law issues in mass tort situations where the interests of dozens of jurisdictions, including the United States, have been implicated.

In the litigation most closely analogous to Agent Orange for present purposes, the federal court for the District of Columbia, sitting in a diversity case as a local District of Columbia court, had to decide the law applicable to claims arising out of the crash near Saigon of an Air Force C-5A carrying United States military and civilian personnel and 226 Vietnamese orphans. *In re Air Crash Disaster Near Saigon, South Vietnam on April 4, 1975*, 476 F.Supp. 521 (D. D.C. 1979). The specific issue before the

court related to the survival of decedents' causes of action. It noted that the District of Columbia follows the "interest analysis" methods in choice-of-law. It analyzed the relevant interests as follows:

> The United States government (as distinguished from any state of the United States) carried on [the Vietnam] war and ended it for national foreign policy and military purposes. The transportation of the orphans on a United States Air Force C-5A, built by Lockheed, was incident to carrying out those foreign and military policies. If the death and injury suffered by these orphans in the dying days of the Vietnam war was caused by the negligence of the United States or of Lockheed, which built the plane expressly for the United States and to its specifications, that is a matter of far greater interest and concern to the United States than to any State of the United States. It is a "paramount" interest and concern of the United States federal government that its courts provide a just and reasonable resolution of claims such as those on behalf of the estates of the deceased orphans. *Compare United States v. California*, 332 U.S. 19, 40, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947).

476 F.Supp. at 526-27. It applied District of Columbia law of survival to all parties despite the fact that plaintiffs resided all over the United States, and that Lockheed Aircraft Corp., a defendant with the United States, had its chief place of business and place of incorporation outside the District. District of Columbia law was really only a surrogate for a national substantive law of liability. Rejecting traditional conflicts of law, the court relied upon the *sui generis* nature of the case. *Id.* at 526.

With only slight paraphrasing, all that was said by the District of Columbia court applies with even greater force to this litigation: "the United States government (as distinct from any state of the United States) carried on [the Vietnam] war . . . for national foreign policy and military purposes." The exposure of veterans to Agent Orange manufactured by the defendants "was incident to carrying out those foreign and military policies. If the . . . injury suffered by" the veterans "was caused by the negligence of the" defense contractors who manufactured Agent Orange "expressly for the United States and to its specifications, that is a matter of far greater concern to the United States than to any State of the United States." The court concluded that "[b]ecause of the national interests at stake here, the law of the forum, which is the law enacted by Congress for the Seat of the Government should [not] be displaced." *Id.* at 529.

In re Paris Air Crash of March 3, 1974, 399 F.Supp. 732 (C.D. Cal. 1975), also dealt with claims arising out of an air disaster occurring in a foreign country—the crash of a Turkish Air Lines DC-10 in France. The specific issue before the court was what law to apply in determining damages, liability having been conceded. Claimants were from 26 foreign countries and at least twelve states of the United States, a total of 38 jurisdictions. The court considered at length the interests of the United States. *Id.* at 745-47. The court gave special weight to the fact that the DC-10 which crashed was "designed, constructed, manufactured, and tested in California," *id.* at 746, and that "the state of residence of designers and manufacturers has a most significant interest in applying its measure of damages to a product distributed throughout the world for the sake of uniformity of decisions involving such designers and manufacturers." *Id.* at 745. Therefore, the court concluded, "[c]learly the United States and the State of California both have governmental interests in

applying the law of California, a state of the United States, in the measure of damages for each claimant, which interests are significantly greater than the interests of countries or states of which either the decedents or claimants are citizens." *Id.* at 747.

An analysis of the rationale of both of the above decisions leads to the conclusion that a state using either "modern" or traditional choice of law methodology would apply federal or national concensus law to this litigation. The federal and national interests in this litigation are far greater than those implicated in either the *Saigon* or *Paris* cases. On the other side of the balance there is no single contact in this case equivalent to the contact of the place of manufacture and design as in *Paris*. A state court would therefore have no rational choice but to apply federal or national consensus common law.

Defendants cite a number of state and federal cases which have applied state law to the government contract defense and to suits by servicemen against defense contractors. *See, e.g., Brown v. Caterpillar Tractor Co.*, 696 F.2d 246 (3d Cir. 1982); *Challoner v. Day and Zimmerman, Inc.*, 512 F.2d 77 (5th Cir.), *rev'd on other grounds*, 423 U.S. 3, 96 S. Ct. 167, 46 L.Ed.2d 3 (1975); *Sanner v. Ford Motor Co.*, (Super. Ct. Law Div. 1976), 144 N.J. Super. 1, 364 A.2d 43, *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (1977), *cert. denied*, 75 N.J. 616, 384 A.2d 846 (1978); *Casabianca v. Casabianca*, 104 Misc.2d 348,428 N.Y.S.2d 400 (Sup. Ct. 1980); *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010 (5th Cir. 1969).

These cases applying specific state law are inapplicable. Two of the suits, *Sanner* and *Casabianca*, were brought by veterans injured by nonmilitary products being used by civilians many years after their manufacture. *Challoner, Whittaker* and *Brown* were suits by individual soldiers and dealt with claims of manufacturing

defects in airplanes and explosives, objects whose misuse is frequently regulated by state tort law. Apparently none of the parties in those cases urged that federal or national common law be applied and there was a logical basis for choosing the law of one particular state. Thus, for example, in *Whittaker*, a suit arising out of the explosion of a hand grenade used by an enlisted man in basic training, the court applied Georgia law where the plaintiff serviceman was a citizen of Georgia, suffered his injury in Georgia, and the Georgia Uniform Commercial Code indicated that Georgia law should apply. 418 F.2d at 1016.

By contrast, plaintiffs in this litigation are probably from all fifty states, the District of Columbia, Puerto Rico and other areas controlled by the government, and at least two foreign countries, the exposure occurred in Vietnam and other countries, transactions and acts bearing a significant relationship to this case occurred in dozens of different states and at least three countries—the United States, South Vietnam and Canada—and defendants are incorporated and do business in many different states.

Because of the *sui generis* nature of this litigation, it is not surprising that there are no cases directly on point. It is, however, common to find state courts and federal courts sitting as state courts under *Erie* applying federal law, because of the predominant federal interest in the litigation. *See, e.g., Filardo v. Foley Bros.*, 297 N.Y. 217, 78 N.E.2d 480, 79 N.Y.S.2d 217 (1948), *rev'd on other grounds*, 336 U.S. 281, 69 S.Ct. 575, 93 L.Ed. 680 (1949); *Weinberger v. New York Stock Exchange*, 335 F.Supp. 139, 143 (S.D.N.Y. 1971); *McLaughlin v. Sikorsky Aircraft*, 195 Cal. Rptr. 764 (Cal. App. 1983). Thus, state courts will often look to federal law if they feel it is appropriate.

That neither New York nor, as far as we have ascertained, any state has had a case such as this one before us does not permit our throwing up our hands and refusing to decide the question. Perhaps it would have been better if certification rules permitted posing the conflicts question to the more than half-a-hundred jurisdictions involved. But no such procedure is presently in place. *See, e.g.*, C. Wright, Law of Federal Courts, 313-315 (4th ed. 1983). In the meantime, this court must ascertain the living state law as best it can. The "evolutionary growth" of the law of conflicts means that each "litigant, whether in the federal or the state courts, has a right that his case shall be a part of this evolution—a live cell in the tree of justice. . . ." Corbin, The Laws of the Several States, 50 Yale L.J. 762, 776 (1941). *See also Essex Universal Corp. v. Yates*, 305 F.2d 572, 580-82 (2d Cir. 1962) (Friendly, J. concurring); Hart & Wechsler's The Federal Courts and the Federal System, 708-710 (2d ed. by P.M. Bator, D.L. Shapiro, P.J. Mishkin & H. Wechsler, 1973); C. Wright, Law of Federal Courts, 370-377 (4th ed. 1983).

IV. *Statues of Limitation*

Statues of limitations present special choice of law problems. Each state has developed precise and complex statutory criteria. The parties have been asked to brief this issue. A decision on the application of statutes of limitations and the effect of the rules respecting conflicts of laws awaits receipt of those briefs.

V. *Conclusion*

For the reasons noted, it is likely that each of the states would look to a federal or a national consensus law of manufacturer's liability, government contract defense and punitive damages. What

is the nature of the national consensus is a subject for another memorandum.

We emphasize that this memorandum is a first general guide to the parties of the court's present thinking. It is subject to refinement and change as the legal issues, facts, and applicable law become clearer during the course of the pretrial and trial proceedings.

s/ Jack B. Weinstein
JACK B. WEINSTEIN
Chief Judge
United States District Court
Eastern District of New York

DATED: Brooklyn, New York
January 12, 1984

AFFIDAVIT OF W. KEITH KAVENAGH DATED AUGUST 31, 1982

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MDL #381
(All Cases)

In re.

"AGENT ORANGE"
PRODUCT LIABILITY LITIGATION

W. KEITH KAVENAGH, being duly sworn, deposes and says that I am a member of the law firm of Yannacone & Yannacone, a member of Yannacone & Associates, and duly licensed to practice in the State of New York and admitted to practice before the Federal District Court, Eastern District of New York.

1. On May 28, 1982, in company with David J. Dean, a member of the law firm of Dean, Falanga & Rose, a member firm in Yannacone & Associates, I attended a conference convened and directed by Joan Bernott, Esq., U.S. Department of Justice, at the office of the Civil Division, Torts Section, Safeway Building, Room 1102, Washington, D.C.

2. Present at the conference were fifteen representatives of the armed services of the United States and government agencies, three attorneys representing certain defendants. (Exhibit A) The Conference convened at 10:53 and ended at 14:30.

3. The purpose of the conference was to determine, if possible, the extent to which the armed services and other government agencies maintained contact with Viet Nam veterans, over what

period of time and by what method; the availability of names and addresses of those who served in the armed forces from 1962 through 1972, the currency and reliability of such data, and bulk mailing capabilities.

4. As for assistance from the Social Security Administration, that agency would require both surname, first initial, and social security number to access a given address through a computer search. The address thus gleaned from the records would be that given by the person on the date he applies for a social security number. A person who applied for a number in 1962 would list his then current address, which is the only address the Administration could produce twenty years later. By matching names with W-2 forms, the Administration can locate a last known employer through 1980, forward mail and request it be sent on to an employee. Thereafter, it is solely within the discretion of the employer to forward it or discard it.

5. Verification by that agency of name-number for a large request takes one-two months and a computer tape with the known name/social security number is a prerequisite. Up to 200,000 letters, standard size paper, duplexed with single sheet preferred, can be accomplished with two months lead time. The representative could not commit the Administration to any cooperation in mailing class notices.

6. Using this agency's addresses is futile and would be akin to relying upon Genesis for the current addresses of the progeny of Noah. Considering the vintage of the addresses of those who served in Viet Nam from 1962 to 1972, and taking into account the well known mobility of the American people, no reasonable businessman would rely on or make use of such a listing in a mass mailing for marketing purposes. One must conclude that

the Social Security Administration is not a feasible route to take to obtain addresses.

7. The General Services Administration maintains a mailing list only for those currently in the armed services; nothing for ex-servicemen. By definition, discharged Viet Nam veterans are not included in any required mailings from the G.S.A. The few still on active service cannot be identified as such. This agency is not a source of names/addresses for purposes of mailing class notices.

8. The National Archive is a depository for computer tapes of 10,000,000 names and addresses of ex-servicemen, known as the 201 File. The list does not indicate place of service. Most tapes are housed in St. Louis, Missouri; a few made in 1971 and considered 80% accurate as to addresses at that date, are in Monterey, California. Portions of the tapes date back to 1965, but accuracy is considered to be 25%. Prior to that date manual records were kept. The inability to determine the place of service of an individual from these tapes renders them useless for class notice purposes.

9. In the opinion of the U.S. Navy representative, that branch of the service has no list of men assigned to fleet or shore duty in Viet Nam. It is his belief that all served off-shore and would not have been exposed. His remarks did not take into account activities of construction battalions, of any (aka "Sea Bee's"), river patrols, dockside duty in loading-unloading operations. Nevertheless, it is estimated that between 145,000 and 150,000 Navy Personnel served in the Southeast Asia theatre. From the information available, it would be impossible to identify them individually.

10. The Air Force representative reported that his branch of the service began automated data of active service personnel in 1971. The data includes only those currently on active duty. Prior to 1969, personnel were assigned service numbers; thereafter social security numbers have been used. In either case one must refer to the DD214 (discharge papers) to ascertain individual numbers for search purposes. The Air Force maintains an archive in Denver, Colorado of active and reserve records. Retention is for ten-year periods. Of the estimated 325,000 Air Force personnel who served in Viet Nam, only about 50,000 might be identifiable from this source, but is would take many months to do.

11. Use of the Air Force data would provide meager results at best. It is unknown how many remained in that service after 1972. Even given a manual search of all prior records, the addresses would be minimally twelve or more years old. Use of the automated data post-1971 might produce a few names, a fraction of those unknown Air Force veterans who should be notified. Both types of searches would be spread over many months with the end product unreliable and questionable at best.

12. The Military Area Command - Viet Nam (MAC-V) documents were discussed briefly. Comprising 40,000 square feet of paper, they are in the custody of the U.S. Army. MAC-V consists of all documents not destroyed or lost dealing with daily activities of the military ranging from uniform-of-the-day orders to other somewhat more serious military matters. All service branches are included. Buried somewhere in that Mt. Everest of documents are the names of the 170,000 personnel who died in Viet Nam. It is unlikely that when personnel were reassigned and recorded, either individually or by unit, the home addresses were also noted. For class notice purposes, this collection of documents would, for all intents and purposes, be useless.

Affidavit

13. The Veterans Administration personnel presented a combined picture of overkill and an historian's nightmare of destruction of records.

a. The VA center in Austin, Texas has tapes of discharged veterans' names and addresses from January 1, 1973 onward, derived from the DD214's. Many tapes deemed outdated have been destroyed.

b. Commencing in 1967, using DD214 data, the VA mailed general benefits notices to all honorably discharged personnel. Many of the original mailing records have been destroyed as outdated. Prior to 1967, VA contracts with veterans were confined to those who sought benefits or where being treated for in-service injuries. There is no address correction capability, so that the one given on the DD214, many ten or more years old, is the one relied upon if available in current files.

c. The VA Beneficiary Identification and Records Location Systems (BIRLS) file extends back to the Indian Wars (which one was not mentioned) and includes those receiving compensation or pensions. On January 1, 1973, BIRLS had no names of Viet Nam veterans and began collecting them based on who received the Viet Nam Service Medal issued by Viet Nam or the Viet Nam Campaign Medal of the United States. "Other than honorable" discharged personnel are not included in VA files.

d. In the Compensation and pension files there are 5,000,000 names from any war and is restricted to those ten percent or more disabled. They can be segregated by dates of duty, but prior to 1972 only names and VA numbers were recorded; no addresses.

e. BIRLS establishes contact with veterans only if contacted by them for benefits and the request is either denied or payments are made. It is likely that outdated files have been destroyed. Before 1973 veterans were assigned a VA number; thereafter social security numbers were used. Thus, patient treatment files, including inactive names, can be searched only by the assigned VA number or social security number. Given only one of the two essential factors, a name, nothing could be found. A number is the *sine qua non* for discovery of names and addresses, the age of the entry determining the reliability of any address.

f. The possibility of using GI insurance policy data as a source proved less than gratifying. Unlike their World War II counterparts, all of whom automatically received insurance, Viet Nam servicemen only received it if they applied individually. Many did not. Unless notified later of any change, addresses would reflect to date of application. An insurance policy exists for any serviceman who has a disability, its unusual feature being the lack of a physical examination requirement. It can be presumed that any names and addresses accessed from this source would be duplicated in other VA files as noted elsewhere in this Affidavit.

g. The VA does have a compilation of 7,000,000 names of those who have received or are now receiving educational benefits. It includes all those from World War II onward and is current for those now taking advantage of such benefits. An inactive file is on tape housed in Chicago. It was estimate by Ms. Elinor Hunter, VA Educational Services, that, since more Viet Nam era

veterans applied for educational benefits than those from previous wars, the list of names might be about sixty percent accurate. Again, a name and a social security number are prerequisites to search for addresses. Many addresses would prove to be outdated and useless, particularly if a veteran exhausted his benefits or dropped out years ago.

h. Generally, the VA is precluded from divulging the names and addresses of veterans by the Privacy Act, 5 U.S.C. 552a. However, pursuant to the Release of Names Act, 38 U.S.C. 3301, it can provide Congressmen with selective lists of names and addresses, subdivided based on zip codes, for mailing public interest announcements relative to VA benefits.

i. When asked a hypothetical question that, given a completely new benefit that all veterans must be made aware of, how would the VA go about notification? The consensus of those present was that reliance would be placed on any available remaining list in-house, with all its shortcomings as noted herein. Thereafter, the VA would request assistance from the various ex-servicemen's organizations such as the American Legion, Disabled American Veterans, Veterans of Foreign Wars, and similar groups. They have sought and obtained such assistance sporadically since 1967. About five of these organizations have been given tapes of names and addressed between 1967 and 1974. Whether they still have them is, of course, problematical and the dates strongly suggest the tapes, if available and not discarded, would be outdated.

j. The Agent Orange Registry, consisting of 85,000 Viet Nam veterans who have applied to the VA for care or benefits, is reasonably current, but reliance on addresses is questionable, duplication with other VA lists is a virtual certainty, and an ongoing attempt to update and verify addresses and names speaks to its unreliability.

14. If nothing else came of this conference, it can be concluded that the federal government's data, vis-a-vis useable names and addresses for class notifcation, is the long sought black hole in space into which all has been drawn and little or nothing of value able to escape.

15. One suggestion was agreed upon by most present. The many veterans' organizations very probably have reasonably current lists of names and addresses of members. So too do those states such as Wisconsin, Pennsylvania, Oregon, North Dakota, South Dakota, Minnesota, Massachusetts, and six more who are known to have compiled Viet Nam veteran names and addresses for purposes of distributing to them small benefits or communications of gratitude. It was the consensus that such lists would be more reliable, albeit not complete, than anything the federal government agencies could produce.

s/ W. Keith Kavenagh
W. KEITH KAVENAGH

DATED: Patchogue, New York
August 31, 1982

Affidavit

Sworn to before me this 31st day of August, 1982.

Marjorie S. Bogart
NOTARY PUBLIC

MARJORIE S. BOGART
NOTARY PUBLIC State of New York
4747440 Suffolk County
Term Expires March 30, 1983

LETTER TO SOL SCHREIBER DATED OCTOBER 29, 1982

October 29, 1982

AMaskin:emm
157-0-107

Telephone:
(202) 724-6744

EXPRESS MAIL

Sol Schreiber, Special Master
Milberg, Weiss, Bershad
& Specthrie
One Pennsylvania Plaza
New York, New York 10199

Re: In re "Agent Orange" Product
Liability Litigation, MDL #381

Dear Mr. Schreiber:

As you may recall, when the Government was asked to advise the parties to the "Agent Orange" litigation of sources for names and addresses of veterans who served in Vietnam, it provided a description of available resources within the Veterans Administration.

One of the systems described was the Veterans Administration Discharge System (VADS), which contains a Vietnam service indicator for veterans separated from military service after 1973. The system also contains the addresses of veterans at the time of their Separation from military service. There is, however, no program for updating the addresses. Also, the system does not reflect individuals discharged from military service prior to 1973.

Letter

There is presently available a computer printout, arranged by Zip Code, of the VADS listing of 539,286 veterans with Vietnam service indicators. If requested to do so, the government is prepared to transmit the listing to the parties, subject, of course, to an appropriate protective order to ensure against unauthorized use of the listing.

Very truly yours,

s/ Arvin Maskin
ARVIN MASKIN
Trial Attorney, Torts Branch
Civil Division

cc:
ALL COUNSEL

EXCERPTS OF TV/RADIO ARTICLE

* * *

Radio's Vast Mass Audience

There are a number of statistics upon which advertisers of products rely and on the basis of which they are willing to spend millions of dollars in radio advertising to sell their product. These statistics pertain to the huge audience reached by the 8900 radio stations operating in the United States.

In 1979 there were almost 451 million radio sets in use. These constituted radio's daily circulation as compared to 62 million newspapers sold everyday.

Radio is number one in reach — reaching more people in a day and week than TV or newspapers and dollar for dollar, delivers greater "people" reach and frequency than TV or newspapers.

In other words, for the same budget, radio delivers added reach, more effective reach, greater frequency and increased impressions.

The greater reach of radio stems from a number of facts which relate to its mobility and ubiquity. Radios are located not only in the home, but in cars, shops, factories and every conceivable place indoors and outdoors. Statistics published by radio trade organizations report that for advertisers who need speed, flexibility and reach with key target audiences, and cost efficiency, radio is more effective than either TV or newspapers.

Furthermore, their research shows that radio delivers the news first in the morning, is the primary news source during daytime,

and radio tops other major media as the first news source in normal periods.[2]

Radio is also the most accessible information source because it serves the public through both battery and plug-in sets as an immediate source of news and information.

Radio's cumulative audience reach is 95.9% in a week and 83.0% on an average day,[3] and radio leads other major media in daily/weekly reach.

Apart from the fact that radio reaches more people than any other media, adults in the 18-49 year age group spend more time with radio than any other medium.[4]

With this data in mind, the plaintiffs propose to broadcast 70 to 100 PSA's twice or three times daily for a period of one month and to target the PSA's so that they reach a demographic age group of 25 years and more.[4a]

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2. "Radio Delivers The News First" — ORC Caravan surveys, July, 1975, for CBS Radio; "Radio Tops Other Major Media" — Trendex, July, 1977, New York area survey.

3. "Radio Leads Other Major Media in Daily/Weekly Reach" — Radio: RADAR, Spring, 1978 report, TV: Special Neilsen National Television Survey, Feb. 1977. Newspapers: Newspaper Readership Project, March, 1977, conducted by Audits & Surveys for Newspaper Advertising Bureau.

4. Radio: RADAR: TV: A.C. Nielsen national television index; Print: TGI.

4a. It is estimated that all veterans who served in the Vietnam war fall within this age group.

Article

The PSA's would be broadcast over as many as possible of the 8900 AM and FM radio stations using the fifteen wired and unwired networks. In this way it is estimated that the PSA Class Notice will reach a population in excess of seventy percent of all persons in the age group 25 and over.

Since the broadcasters are required to keep complete logs of all programming, plaintiffs will furnish the Court with proof that the PSA's have been broadcast through affidavits or other certifications by the stations evidencing the date, time and frequency of the PSAs.

Plaintiffs will also furnish the Court with the name of the station, network, location and the number and frequency of PSAs broadcast and will also furnish quantitative data if required by the Court, as to the number of listeners to each station at any given quarter of an hour and the average number of times each listener was reached with the PSA.

Cost Considerations

The PSA carries no air charge. PSA production charges are concerned mainly with writing the script, paying the announcer who will read the script, taping the script and distributing it to as many radio stations as possible.

Fifteen wired and unwired networks cover approximately one-half the stations of the United States; hence the use of network radio stations to broadcast the tape reduces production and handling costs while assuring that the PSA will reach a vast listening audience.

In contrast, newspaper and TV costs are much greater. Neither the news or TV media are required by any regulatory agency such as the FCC to print or broadcast a PSA.

A radio audience is reached at lower costs than TV or newspaper and dollar for dollar radio delivers greater "people" reach than TV or newspapers.[5]

Moreover, even if a newspaper were willing to publish a PSA free of charge, the production costs associated with the printing process itself would be prohibitive if plaintiffs had to pay such costs and if the objective were to use newspapers to reach the vast audience which can be reached by radio.

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5. "Media Cost-Per Thousand Indices" — McCann-Erickson, Inc., Network and Spot TV/Radio averaged by RAB Research Dept't.

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